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A RE-EXAMINATION OF THE *JUS TERTII* IN CONVERSION

THE object of this article is to challenge the orthodox view as to the validity of the defence of the *jus tertii* to an action for the recovery of chattels. In view of the almost universal agreement on this question this might be thought a somewhat rash undertaking. Nonetheless it will be submitted that the current view is wrong both in principle and on authority, and is the result of a misinterpretation of the leading cases.

That it is no exaggeration to say that the orthodox view is almost universally accepted may be seen from the following quotations:

Pollock and Wright on *Possession* put it thus:

> "Existing possession, however acquired, is protected against any interference by a mere wrongdoer; and the wrongdoer cannot defend himself by showing a better title than the plaintiff's in some third person through or under whom he does not himself claim or justify. . . . On the other hand, a plaintiff who seeks redress solely for wrong done to his right to possess is not favoured to the same extent. If his actual possession has not been disturbed by the act complained of, he may be defeated by showing that someone else, who need not be the defendant or anyone through whom the defendant claims, had a better right to possess." [1]

The eleventh edition of Salmond is to the same effect:

> "If, however, the plaintiff was not in actual possession but relies upon his right to possession, he must recover on the strength of his title, and proof of the *jus tertii* will destroy the only thing upon which he relies." [2]

Winfield took the same view:

> "Where the plaintiff was *in possession* at the time of the conversion, the defendant cannot set up *jus tertii*." [3]

[1] At p. 91.
[2] At p. 341.
[3] *Textbook of the Law of Tort*, 6th ed., p. 422.

And in the following paragraph:

> "Where the plaintiff was *not in possession* at the time of the conversion, *i.e.*, where he had only the right to possess, *jus tertii* can be pleaded by the defendant." [4]

Similar expressions of this view are to be found in Holdsworth,[5] Goodeve on *Personal Property* [6] and Paton on *Bailment*.[7]

The current view may, therefore, be reduced to two apparently simple propositions:

(1) Where the defendant has actually infringed the plaintiff's possession, then, subject to a defence of title paramount, the *jus tertii* affords no answer to an action.[8]

(2) Where the defendant has not infringed the plaintiff's possession he may set up the *jus tertii* as a defence.

With the first of these propositions we make no quarrel. It is the second which we propose to challenge and hope to disprove.

A plaintiff who is suing for the recovery of a chattel may have lost possession in one of several ways, but of these two are of particular importance in connection with the *jus tertii*. (I) He may have bailed the goods to another party either on the terms that he should have an immediate right to possession, or so that he lost the immediate right to possession; or (II) he may have lost them without anyone else forthwith obtaining possession. These two possibilities will be examined in turn and their relationship to the *jus tertii* considered.

I—Cases of Bailment

The rights of the bailor against the bailee who is still in possession are straightforward and present no difficulty where the bailor is absolute owner. But where the bailor has some interest less than absolute ownership, the question may arise whether the bailee can resist an action by the bailor even where the bailor retains the immediate right to possession. The general rule is that the bailee cannot dispute his bailor's title. Thus in *Armory* v. *Delamirie* [9] the plaintiff found a jewel and took it to the defendant to have it valued. The defendant refused to return it and Pratt C.J. held that he could maintain trover. Of course on the facts of the case possession may have remained with the plaintiff, mere custody passing to the defendant, but this could scarcely have affected the decision.

However this rule admits of one exception. The bailee can set up the title of a third person if he has been evicted by title paramount or defends under the authority of that title. Thus in *Biddle*

[4] *Ibid.*
[5] H.E.L. vii, 424–31.
[6] 9th ed., p. 26, note (*e*).
[7] At p. 383.
[8] It was decided in *Jeffries* v. *G. W. Ry.*, 5 E. & B. 802, that this rule applied in trover just as in trespass, but since the abolition of the forms of action the rule can be stated in general terms.
[9] 1 Stra. 505.

v. *Bond* [10] the plaintiff levied distress against one R and delivered the goods to the defendant to sell them by auction. R informed the defendant that the distress was illegal and warned him not to proceed with the sale, or, if he had already sold the goods, to hand the proceeds to him. The defendant sold the goods but declined to pay the proceeds to the plaintiff. The court gave judgment for the defendant, and Blackburn J. stated the law thus:

> "We do not question the general rule that one who has received property from another as his bailee or agent or servant must restore or account for that property to him from whom he received it. . . . But the bailee has no better title than the bailor and, consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him.[11] . . . We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury* v. *Scotsford*,[12] *viz.*, that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount." [13]

The position is sometimes further confused by the intrusion of difficult questions of agency law. In *Rogers Sons & Co.* v. *Lambert & Co.*[14] the plaintiffs bought and paid for some copper lying in the defendants' warehouses. The plaintiffs then resold it, and were paid by the sub-purchasers, but later requested the defendants to deliver to them, nonetheless. The defendants knew of the resale, and declined to deliver to the plaintiffs though they were not acting on behalf of the sub-purchasers. The Court of Appeal held that the plaintiffs were entitled to insist on delivery to themselves. Lord Esher M.R. said:

> "Even though the plaintiffs had given a delivery order to a third person, still as between the plaintiffs and the defendants, the plaintiffs could withdraw that order at any moment and they did withdraw it by demanding the goods. Therefore upon the contract of bailment the defendants are without any defence as for a breach of contract." [15]

This decision is not without its difficulties because if the property in the copper had passed by the resale, as it might well have done, the defendants were, in effect, being compelled to commit a conversion.[16] However, it does show that there are strict limits to the admissibility of the *jus tertii* as a defence between bailor and bailee under the doctrine of title paramount.[17] Moreover, even where the

[10] 6 B. & S. 225.
[11] At p. 231.
[12] Yelv. 22.
[13] At p. 233.
[14] [1891] 1 Q.B. 318.
[15] At p. 324.
[16] Or, rather they would have been, had not the copper been sold under an order of the court and the money paid into court.
[17] See also *Blaustein* v. *Maltz, Mitchell & Co.* [1937] 2 K.B. 142. The earlier C.A. decision in *Kingsman* v. *Kingsman* (1880) 6 Q.B.D. 122 (where it was held that a woman's agent to collect and pay over rents to her could

defence succeeds it is not really a case of *jus tertii*, because the substantial issue is one of title between two and not three persons.

Since the *jus tertii* is no defence where the plaintiff can show an actual infringement of possession the question of the *jus tertii* strictly so called usually only arises where a third party obtains possession from the bailee and the bailor attempts to recover the goods from him: this is because it is usually only in such circumstances that the plaintiff cannot rely on trespass, nor on his right as a bailor.[18]

Strictly speaking the *jus tertii* is only relevant where (1) the plaintiff has a better right to possession than the defendant, but (2) a third party has a better right than either of them. If the first requirement is not satisfied the plaintiff must inevitably fail and it is immaterial whether or not a third party has a better right than the plaintiff. One way in which the defendant can show that the plaintiff has not even a better right than he, is to show that the plaintiff has no right at all either because the absolute title is vested in a third party, or because the various rights of ownership are divided between a third party and the defendant himself. Such a defence can in one sense be said to be based on the *jus tertii*, but it is essential that loose terminology should not obscure the fact that in such cases the plaintiff fails, not because a third party has the best right of all, but because the plaintiff himself has not a better right than the defendant. The essential distinction can be put in terms of the burden of proof; if the plaintiff cannot show a better right than the defendant he has not made out a prima facie case and has thus not discharged the initial burden of proof. On the other hand the *jus tertii* is a defence to be proved by the defendant and presupposes that a prima facie case has been established. All this may sound elementary but it is necessary to insist upon it if only because Holdsworth [19] repeatedly confuses the two types of case. He concedes that until the end of the seventeenth century it was never necessary to prove an absolute title in trover or detinue and all the cases which he cites to illustrate the change to the alleged modern rule requiring proof of an absolute title are not in fact cases of the *jus tertii* strictly so called. Thus in *Dockwray* v. *Dickenson* [20] trover was brought for a ship and cargo and the defendant was permitted to show in mitigation of damages that the plaintiff

decline to pay them to her on her marriage before 1882, as they then belonged to the husband) is not easily reconciled with *Rogers* v. *Lambert*. Its value is, however, weakened by the fact that judgment was unreserved and by the dissent of Brett L.J.

[18] Thus Holdsworth says (H.E.L. vii, 429) "The fact that the principle (*i.e.*, of the *jus tertii*) was not applicable either to the case of bailment, or to the case where the defendant in trover had got possession of the goods in a manner which involved some trespass against the plaintiff, no doubt tended to make the cases to which it was applicable more rare and so to retard its recognition."

[19] H.E.L. vii, 424–31.

[20] (1697) Skin. 640.

was in fact owner of only a small fraction of the cargo. It is difficult to see how this case is relevant to a discussion of the *jus tertii*; the plaintiff not only had no absolute title to the rest of the cargo, he had no right whatever.

Leake v. *Loveday*,[21] the principal authority for the orthodox view, is itself another illustration of this type of case. The facts of that case were as follows. In 1837 the plaintiff bought some furniture from one Cox but left him in possession. In 1839 Cox became bankrupt but his assignees made no claim to the furniture. In 1841 the sheriff, the defendant, in execution of a writ of *fi. fa.* sued out by another lot of creditors seized and sold the furniture. The assignees then gave notice of the claim and the sheriff handed the proceeds to them. The plaintiff sued the sheriff in trover. Since, as the court held, the plaintiff's title to the goods became vested in the assignees in bankruptcy, and he had never been in possession he had lost all right to the goods. Hence he not only had no absolute title but not even a better right than the sheriff, who under the writ of *fi. fa.* had a right to dispose of the goods, though subject to the claim of the assignees in bankruptcy. Of the four judgments delivered in the case, that of Maule J. most clearly proceeds upon this ground:

> "The defendant," he says "may show either that the plaintiff has no right against anybody, or that he, the defendant, has some right which prevents the plaintiff from maintaining the action against him. Here, the defendants say that the plaintiff has no right to the goods at all. The evidence given by them was offered not to show the right of third persons but to prove that the goods were not the property of the plaintiff." [22]

Coltman J. seems to have agreed:

> "The sheriff is clearly not a trespasser as against the plaintiff; for he has seized, not his goods, but the goods of the assignees." [23]

Erskine J. seems to have decided the case on the ground that the payment of the proceeds of the sale by the sheriff to the assignees enabled him to set up their right under the doctrine of title paramount.[24] The judgment of Tindal C.J. is the only one which clearly supports the view that the *jus tertii* is a good defence. Thus the Chief Justice said:

> "It seems to me that . . . the plaintiff is called upon to

[21] (1842) 4 M. & G. 972. The case is not one of bailment but it does not seem that the principles applicable are any different. It is difficult to see how a different result could have been reached even if Cox had been the plaintiff's bailee.

[22] At p. 986.

[23] At p. 983.

[24] On the facts of the case this view has much to commend it. The defendant had, after all, paid the money to the persons entitled to it. It would certainly be strange if this were to lay him open to an action by a third party in the absence of any special circumstances.

> prove the goods to be his property and that the defendants are let into any evidence which will show that such goods are not the plaintiff's." [25]

But as the plaintiff could not even prove a better right than the defendant this discussion would in any event seem to have been *obiter*.

In *Newnham* v. *Stevenson* [26] only nine years later, Jervis C.J. summed up the decision in *Leake* v. *Loveday* thus:

> "In *Leake* v. *Loveday* the plaintiff brought trover for goods not in his actual possession at the time of the conversion. It was, therefore, necessary for him to show a title, which he did, by showing that at one time the goods were his. In answer to this case the defendant proved that the goods, at the time of the conversion, were, with the consent of the plaintiff, the true owner thereof, in the order and disposition of a person who had committed an act of bankruptcy, and against whom a commission issued, and thus that the title which the plaintiff once had was at an end—the consent of the plaintiff together with the bankruptcy transferring the property and right of possession to the assignees as effectually as if the plaintiff had sold and delivered the goods to the bankrupt; in which case whether the assignees claimed the goods or neglected to do so the goods would be their's and not the plaintiff's."

It is therefore submitted that *Leake* v. *Loveday* is no authority for the proposition that the *jus tertii* properly so called is a defence to an action of conversion.

Involuntary bailees, though they are not strictly speaking bailees at all would no doubt be treated as bailees for the purposes of this rule. For instance if A finds a jewel whose owner cannot be traced and sends it to B, a jeweller, to have it valued, it is scarcely credible that B could set up the *jus tertii* to an action by A. The case is only distinguishable from *Armory* v. *Delamirie* [27] on the ground that B is not properly speaking a bailee at all.[28]

II—Cases of Finding

That the *jus tertii* may be relevant in a case involving finding may be seen from the following hypothetical example. A finds a chattel the owner of which is untraceable. He keeps it for some years and then himself loses it. B finds it, and when sued by A pleads the *jus tertii*. As was pointed out earlier, where the plaintiff relies on an actual infringement of his possession the *jus tertii* can never be pleaded.[29] But what amounts to possession for this purpose? In

[25] At p. 981.
[26] (1851) 10 C.B. 714. The facts of the case itself are immaterial for present purposes.
[27] 1 Stra. 505.
[28] Of course if the arguments presented below are correct then the *jus tertii* would not succeed as a defence even in the absence of the special rule regarding bailments.
[29] Except, of course, when the defence is in substance one of title paramount.

particular is the loser of a chattel still in possession of it for the purposes of the civil law? For clearly if a loser does not retain possession, and his own title happens to be a merely possessory one, he can only sue a finder in conversion, relying on his right to possession; and this is precisely the situation in which we are told the *jus tertii* is a defence. Hence it is of vital importance to decide whether the loser of goods can maintain trespass, or is compelled to sue in conversion.

This necessitates an examination of the relationship between the criminal and civil law of finding because it is by no means clear that possession and trespass mean the same thing in both. Not unnaturally there is a dearth of authority on the relationship between the civil and the criminal law of finding. The main rule of the criminal law is now tolerably clear. A person who finds a chattel in such circumstances that he must have known that the owner could be traced commits larceny if he takes the thing *animo furandi*. Since it was always a doctrine of the common law that there could be no larceny without trespass the judges were forced to the conclusion that the owner remained in possession of the goods even after he had lost them. Hence the fiction arose that the owner was deemed to consent to the finder taking possession where he intended to return it, but not where he intended to keep it, and that the dishonest finder was therefore guilty of trespass and larceny and the honest finder of neither. While this seems to be the basis of the judgment of Parke B. in the leading case of *R.* v. *Thurborn*,[30] it is submitted that the Larceny Act, 1916, entitles us to reconsider this branch of the law. The drafting of the Act certainly seems to suggest that larceny by finding is a case of larceny without trespass. Section 1 (2) (i) of the Act enacts that "the expression 'takes' includes obtaining the possession . . . (*d*) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps." The use of the term "obtaining" in contradistinction to the term "takes" is not without significance and seems to support the view that the cases therein enumerated are to be treated as though there were a "taking," *i.e.*, a trespass, although in fact there is none. Moreover, if the basis of larceny by finding is that the loser retains possession, what is the position if the loser dies before the chattel is found? Elastic as the doctrine of possession has proved itself to be in criminal law, it is submitted that it would be stretching it to breaking point were the personal representatives held to acquire possession automatically. It is true that where possession is in dispute the law inclines to place it with the owner, but different principles seem applicable to obtaining possession (as in such a case) and retaining it, once obtained. On the

[30] (1849) 1 Den. 387.

other hand, it would certainly be strange if such a fortuitous occurrence as the death of the owner were to prevent a dishonest finder being guilty of larceny. It is submitted that the best way to avoid this difficulty is to admit that the loser does lose possession and that the reason why dishonest finding is larceny is because the Larceny Act says it is.

But whether this is right or not, it is at least highly doubtful whether the loser of a chattel can bring a civil action of trespass.[31] It follows that if the loser's title is a merely possessory one he could be defeated by the *jus tertii* if that defence has any validity. Such a result seems sufficiently remarkable to raise grave doubts as to the whole doctrine of the *jus tertii*.

III—Other Cases

The cases of bailment and finding do not therefore lend support to the view that the *jus tertii* is a valid defence to an action of conversion. Of the other decisions *Buckley* v. *Gross*[32] at first sight seems to have been a case in which the *jus tertii* succeeded. The plaintiff obtained possession of some tallow which had been deposited in warehouses on the banks of the Thames and which had melted and flowed down to the river in a fire. He was charged with having possession of tallow, supposed to have been stolen or unlawfully obtained. The charge was dismissed but the magistrate ordered the tallow to be retained under statutory powers and it was later sold to the defendant. The plaintiff now brought trover against him, and the defendant appears to have successfully set up the *jus tertii*. Cockburn C.J. said:

> "The plaintiff who had nothing but bare naked possession (which would have been sufficient against a wrongdoer) had it taken out of him by virtue of this enactment. As against the plaintiff therefore the defendant derives title not from a wrongdoer but from a person selling under authority of the justice, whether rightly or not is of no consequence."[33]

Crompton J. put the matter even more broadly:

> "Where possession is lawfully divested out of a man, and the property is ultimately converted by a person who does not claim through an original wrongdoer, the party whose possession was so divested had no property at the time of the conversion."[34]

The crucial question here is what is meant by "wrongdoer." At first sight these passages look unconvincing for they seem to beg

[31] The origin of trover with its fictitious allegation of loss and finding also suggests that case and not trespass is the proper remedy for the loser of goods.

[32] (1863) 3 B. & S. 566.

[33] At p. 572.

[34] At p. 573.

the very question at issue. If the plaintiff had had a sufficient title to maintain conversion, the defendant would have been a wrongdoer against him. However, it seems probable that the term "wrongdoer" was being used as equivalent to "trespasser." What does seem deducible from the case, then, is that a possessory title is destroyed if the holder's possession is lawfully divested from him. This is certainly a qualification upon the extreme logic of the rule that possession is equivalent to ownership as against all the world except the absolute owner (or, more strictly, any person or persons with a better right), but it is necessary if the law is to avoid some highly unreasonable results. Were the rule otherwise the right of a finder would continue even after the goods had been restored to the true owner, a situation which might clearly lead to inconvenient, not to say unjust, results. Even so it does not seem necessary to invoke the *jus tertii* in these cases. *Buckley* v. *Gross* does indeed go further than *Leake* v. *Loveday* because in the latter case there was no evidence that the plaintiff had ever been in possession at all, whereas in the former his whole claim was based on the possession he had once had. However it seems safer to say that the plaintiff's title, such as it was, was extinguished by the sale rather than that the defendant could defeat the plaintiff by pleading that a third party had a better right than either of them.

It is instructive to compare *Buckley* v. *Gross* with *Rogers* v. *Lambert*, for a different result was reached in the later case, although the plaintiff's title in that case had also been extinguished, *viz.*, by the resale. The only ground of distinction is that *Rogers* v. *Lambert* was a case of bailment; in other words the rule that a bailee cannot dispute his bailor's title is paramount to the rule that a title, once extinguished, can support no action.

IV—CONCLUSIONS

Much of the difficulty has thus arisen from ambiguity in the term *jus tertii*. It will be seen that the phrase "Right to Possession" is no less ambiguous and is the source of no less confusion. It may be as well to restate here a typical formulation of the rule. Thus in Salmond it is said:

> "If, however, the plaintiff was not in actual possession [35] but relies upon his right to possession, he must recover on the strength of his title, and proof of the *jus tertii* will destroy the only thing upon which he relies." [36]

This apparently simple formulation hides a mass of ambiguity. What is meant by "right to possession" here? Does it mean at the time of the alleged wrong, or at the time of the action? If it

[35] This must mean at the time of the alleged wrong, in other words a case where the defendant has infringed the plaintiff's possession and clearly cannot rely on the *jus tertii*.

[36] *Torts*, 11th ed., 341.

means at the time of the action then the sentence could apply equally where there has been actual trespass, and it is admitted on all hands that the *jus tertii* is no defence there.[36a] If it means, as is more probable, at the date of the alleged wrong, then the crucial question is, right to possession *as against whom*? If this simply means as against the wrongdoer, Salmond's formulation is a mere truism. He is saying nothing more than that the plaintiff will fail if he cannot prove a right to possession as against the defendant at the time of the wrong—a proposition which is hardly worth stating. On the other hand, Salmond cannot mean right to possession as against the whole world without repudiating what he says, only one page earlier, about possessory titles:

> "A possessory title once acquired probably also continues to exist notwithstanding a loss of the possession by the wrongful act of a stranger. Thus if A finds goods and they are taken from him by B and sold by B to C, it is probable that A has an action of trover not only against B but also against C." [37]

In this example A clearly has no right to possession as against all the world for he is not the true owner. If then the *jus tertii* is a defence, as Salmond asserts, why would it not be available to C?

Winfield was more consistent in his views than Salmond but in his complete acceptance of the doctrine of the *jus tertii* he was led to deny the right of a finder to sue in conversion unless he was actually in possession at the time of the wrongdoing.[38] This is a difficult view to sustain in face of the remarks of Pratt C.J. in *Armory* v. *Delamirie*: "that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner and consequently may maintain trover." It is moreover inconsistent with the actual decision in *Hannah* v. *Peel*,[39] a case which Winfield regarded as rightly decided on the wrong ground.

In view of the ambiguity thus shown to be inherent in the term Right to Possession some analysis may be attempted. The term may mean (1) the right to *obtain* possession, or (2) the right to *retain* possession. Both of these meanings may be subdivided into cases (*a*) where there is a right as against the owner, *e.g.*, the right

[36a] Moreover if the defendant has a right to possession as against the plaintiff at the time of the action (even if he had none at the time of the wrong) the defendant is in effect setting up a *jus sui* and not a *jus tertii*: *Eastern Construction Co.* v. *National Trust Co.* [1914] A.C. 197.

[37] At p. 340.

[38] "The principle [of *The Winkfield* [1902] P. 42] is not confined to the bailee, but extends to the finder of goods and apparently to anyone with a limited interest in them, provided he was in possession at the time of conversion; but not to one who had merely a right to possess at that moment, for that would be inconsistent with the rule that *jus tertii* may be pleaded against him if he sues for conversion"—*Textbook*, 5th ed., p. 377. In the 6th ed. the learned editor has omitted the second half of this sentence.

[39] [1945] K.B. 509.

of a hirer or pledgee, and (*b*) where there is a right as against the whole world except the owner, *i.e.*, a possessory title. Now if the plaintiff had a right to *retain* possession at the time of the wrong, *i.e.*, if he was in possession, the *jus tertii* is clearly no defence. Likewise if he has a right to possession as against the owner, because *ex hypothesi* there can be no third party to whom the right can relate. This only leaves case (1) (*b*), and thus the *jus tertii* can only be relevant where the plaintiff shows that at the time of the wrong he had a right to *obtain* possession as against all the world except the true owner.

Put in this way, it is submitted that it becomes clear that the real question is not, must the plaintiff prove an absolute or relative right? but, what confers a right to obtain possession from all the world except the owner? The answer, it is submitted, is clear. Possession itself, even wrongfully or feloniously acquired,[40] confers a possessory title. This title avails against all later possessors even if they are not trespassers against the plaintiff.[41] The whole law of possessory titles seems to be based on this assumption and it is expressly recognised by Pollock and Wright on *Possession*.[42] It is moreover inherent in the well-known cases of *Bridges* v. *Hawkesworth*[43] and *Hannah* v. *Peel*,[44] and though these cases may have wrongly decided that the plaintiffs had the prior possession, their correctness seems unquestionable, granted this assumption. Yet, if the *jus tertii* is a defence they are clearly wrong on this ground. It is true, in *Bridges* v. *Hawkesworth* the plaintiff had himself handed the parcel of notes to the defendant, so that, on the assumption that the plaintiff had the prior possession, the case might have been one of bailment and the defendant would have been unable to plead *jus tertii* on that ground. But the facts of *Hannah* v. *Peel* raise a clear case of *jus tertii*, for the finder of the brooch in that case handed it to the police, and they delivered it to the defendant, the owner of the house where it had been found. The plaintiff could neither claim the benefit of the rule as to bailees, nor could he allege an actual infringement of his possession by the defendant, so this would seem to have been a clear case for the application of the *jus tertii*; yet it never seems to have occurred to anyone that it would have afforded an answer to the plaintiff's claim. In point of fact it is submitted that it would have been no answer for the simple reason that our law does not recognise the *jus tertii* as a defence in any shape or form.

[40] See the Canadian case *Bird* v. *Fort Frances* [1949] 2 D.L.R. 791. But *contra* Crompton J. in *Buckley* v. *Cross* (*supra*).

[41] The point has been expressly decided in this sense in at least one American case: *Clarke* v. *Maloney*, 3 Harrington (Del.) 68, cited in Holmes, *The Common Law*, p. 237. The nearest approach to this case in English law is *R.* v. *Swinson* (1900) 64 J.P. 73 where it was held that the property in an indictment for larceny could be laid in the finder of a purse.

[42] At p. 93.

[43] 21 L.J.Q.B. 75; 15 Jur. 1079.

[44] [1945] K.B. 509.

The problem whether the *jus tertii* is ever a good defence in English law has often been equated with the obverse question of absolute ownership. Holdsworth seems to have taken the view that if the *jus tertii* were no defence to proprietary actions it would inevitably follow that English law recognised no such thing as absolute ownership [45]; a fact which perhaps partially accounts for his acceptance of the doctrine of the *jus tertii*. But this is by no means an inevitable conclusion. Indeed it seems almost impossible to deny that English law does, for some purposes at least, recognise such a thing as absolute ownership of chattels. The definition of a contract of sale of goods by the Sale of Goods Act, 1893, expressly refers to *the property* in goods, a term which seems inconsistent with any other view.[46] Moreover in *Rowland* v. *Divall* [47] the Court of Appeal held that a failure to pass the property in the goods was a total failure of consideration, Atkin L.J. saying, "There can be no sale at all of goods which the seller has no right to sell." [47a] But, it is submitted that this has no bearing whatever on the *jus tertii*. Because English law recognises absolute ownership of chattels in the law of sale, it does not follow that a plaintiff whose possession has not been infringed must prove an absolute title as against the defendant.

In conclusion the following propositions are submitted as warranted by the authorities, or at least, as sound in principle and not inconsistent with the authorities.

(1) If the plaintiff's possession has been infringed by the defendant, he cannot plead the *jus tertii* unless he has been evicted by title paramount, or defends under the authority of that title.

(2) The rule is the same where a bailor sues his bailee.

(3) If a plaintiff can prove that at the time of the alleged conversion he had a better right than the defendant to obtain possession he will succeed against him in an action of conversion notwithstanding that a third party had a better right than either of them.

(4) If, on the other hand, the plaintiff sues in conversion but cannot prove a better right than the defendant, he will fail simply because he has made out no cause of action and not because of the supposed defence of the *jus tertii*.

(5) If the plaintiff's title, whether absolute or possessory, has in any way been extinguished, then, subject to the effect of (2) above, he cannot succeed in conversion against someone who is now in possession. — Buckley v Gross

[45] "If the plaintiff need only prove a better right than the defendant's then modern English law would like the medieval law have continued to refuse to recognise anything like an abstract dominium or ownership which is good against all the world"—*Hist. Intro. to the Land Law*, p. 182.

[46] Defined by s. 62 as "the general property in goods."

[47] [1923] 2 K.B. 500.

[47a] And see the observations of Evershed M.R. in *Jarvis* v. *Williams* [1955] 1 W.L.R. 71 at p. 75.

(6) The rejection of the *jus tertii* as a defence is in no way incompatible with the recognition of absolute ownership of chattels in English law.[48], [48a]

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[48] Similar problems arise in the law of real property which cannot be discussed here. For a full discussion see Wiren, 41 L.Q.R. 139, Hargreaves 56 L.Q.R. 376, and Holdsworth, *ibid.*, 479. Wiren takes the view that it is essential for the defendant who pleads *jus tertii* to establish some particular person to be the true owner. If this were true it would meet many (but not all) of the difficulties here suggested to arise from the defence, but I have found nothing in principle or authority to support this narrow interpretation of the term *jus tertii*.

[48a] I should like to thank Mr. Rupert Cross M.A., B.C.L., Fellow of Magdalen College, Oxford, for much valuable advice and encouragement given to me while I was writing this article.

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NATIONAL ASSISTANCE AND THE LIABILITY TO MAINTAIN ONE'S FAMILY

That the poor are with us always remains a truism even in these days of the Welfare State, although the presence of poverty may be disguised by substituting the euphemism "national assistance" for the plain language of "poor relief." [1] The remedial treatment of this social malady has a long and varied history which for too long has remained the almost exclusive study of the social, rather than the legal historian.[2] It is interesting, therefore, to find in *National Assistance Board* v. *Wilkinson* [3] the present Lord Chief Justice devoting a considerable part of his judgment to tracing the ancestry of sections 42 and 43 of the National Assistance Act, 1948, which are concerned with the liability of members of a family to maintain one another. In this short article it is proposed to recall the facts of that important case, to examine and expand the historical survey of the learned Lord Chief Justice, and to indicate some of the wider aspects of the liability imposed by the Act of 1948.

The Facts and Decision in National Assistance Board *v.* Wilkinson

A special case was stated by the Durham justices on the interpretation of sections 42 and 43 of the Act of 1948. Section 42 (1) states: "For the purposes of this Act—(*a*) a man shall be liable to maintain his wife and his children,[4] and (*b*) a woman shall be liable to maintain her husband and her children." [4] Section 43 states:

> "(1) Where assistance is given or applied for by reference to the requirements of any person . . . the Board may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted.
>
> "(2) On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate."

[1] In like manner the French, despite their *penchant* for plain speaking, now refer officially to the poor as *les économiquement faibles*.

[2] Studies of the poor law by social historians include: Leonard, *Early History of English Poor Relief* (1900); Marshall, *The English Poor in the 18th Century* (1926); S. and B. Webb, *English Poor Law History* (1929); Hampson, *The Treatment of Poverty in Cambridgeshire*, 1597–1834; Levy, "The Economic History of Sickness and Medical Benefit before and since the Puritan Revolution" (*Economic History Review*, Vol. XIII, pp. 42–57; Vol. XIV, pp. 135–60); Tate, *Parish Chest* (1951) pp. 187–239.

[3] [1952] 2 Q.B. 648.

[4] Children include, in the case of a man, children of whom he is adjudged the putative father, and, in the case of a woman, her illegitimate children: s. 42 (2). The term is limited, by s. 64 (1), to those under the age of sixteen years.

The facts of the case, as found by the justices, were that the wife had refused to join her husband in accommodation found by him, and upon his then ceasing to maintain her she had applied for assistance to the Board. Later two complaints were preferred by the Board against the husband, alleging that he was the husband of the wife, whom he was liable to maintain pursuant to section 42 and by reference to whose requirements assistance had been given amounting to £26 18s. at the rate of £1 4s. 6d. a week, and to whom assistance continued to be given at that rate, and applying for a summons to be served upon him under section 43 to repay the sum of £26 18s., and to pay such sum, weekly or otherwise, as the court might consider appropriate. The justices found that the wife's refusal to join her husband was unreasonable and held her to have deserted him. They did not accept the contention of the Board that the husband's liability under section 42 was absolute, but considered that the wording of section 43 (2) enabled them to have regard to the conduct of the wife: in view of her conduct, the husband was not liable to maintain her under section 42; accordingly they dismissed the complaints.

The Divisional Court (Lord Goddard C.J., Devlin and Gorman JJ.) unanimously upheld the decision of the justices despite the strenuous argument of counsel for the Board that section 42 imposed upon the husband an absolute duty to maintain his wife, regardless of her conduct, and that the contrary decisions given upon the previous Poor Law legislation must now be disregarded, the Act of 1948 having superseded such earlier legislation. Counsel also argued that the reference to "all the circumstances" in section 43 (2), upon which the justices had in part relied, related only to the circumstances of the defendant, in particular his financial position, and not to the matrimonial conduct of the wife, and therefore such circumstances were only relevant in determining the quantum, not the existence, of the liability of the husband. The court, however, felt itself still bound by the earlier cases, which clearly relieved a husband of his duty to support his wife where she had committed adultery or had deserted him, this immunity being permanent in the case of an adulterous wife,[5] but only for the duration of the desertion in the case of the deserting wife.[6] Applying the rule of construction in *Minet* v. *Leman* [7] the court decided that no such sweeping change as counsel for the Board had advocated could have been intended by the legislature without more explicit words than those to be found in section 42. For, as

[5] *R.* v. *Flintan* (1830) 1 B. & Ad. 227; *Culley* v. *Charman* (1881) 7 Q.B.D. 89.

[6] *Jones* v. *Guardians of Newtown and Llanidloes* [1920] 3 K.B. 381; *cf.* *Flannagan* v. *Bishop Wearmouth Overseers* (1857) 8 E. & B. 451, where a husband was found not guilty of wilful refusal or neglect to maintain his wife under the Vagrancy Act, 1824, since he remained willing to support her after she, for good reason, had refused to continue living with him.

[7] (1855) 20 Beav. 269, 278.

Devlin J. expressed it, "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration of the general law unless it uses words that point unmistakably to that conclusion." In the present case the wife, by her refusal to live with her husband, was in a state of desertion throughout the period when she was receiving the assistance of the Board: the Board could not therefore recoup itself against the husband under section 43 nor obtain an order against him for future weekly payments under the second complaint. Certain observations in the unreported case of *Aldritt* v. *Aldritt*,[8] which tended to support the Board's view, were considered to have been *obiter*.

Previous Legislation and Administrative Practice

Before arriving at this conclusion the learned Lord Chief Justice gave a valuable historical survey of the course of legislation creating the right of authorities giving poor relief to recover from a husband some amount for the maintenance of his wife.

His Lordship begins this survey with the Poor Relief Act, 1601, which he describes as "the Act which established the Poor Law." Doubtless this statement is a deliberate simplification and, in so far as this Act did consolidate the previous law, it is unobjectionable. Historically, however, the statement may mislead: the Act of 1601 was mainly a re-enactment of an Act of 1597, which itself marks the culmination of a series of statutes all concerned with various aspects of the problem of the poor, in particular, the suppression of vagrancy, the repression of mendicancy by the able-bodied, and the provision of relief and work for the impotent poor and workless: it was with this last remedial aspect that the 1597 Act was chiefly concerned. Moreover, the poor law statutes of the sixteenth century were themselves partly copied from the regulations of municipalities, such as London and the larger towns, in which places the problem of beggary had become too acute to be left to be relieved by private almsgiving and the corporate charity of religious foundations.[9] The suppression of the monasteries in 1536–39 made the problem a national one, for which a national system of relief administered by secular authorities had to be

[8] June 12, 1951.

[9] See Leonard, *op. cit.*, Chap. III. This was not the only instance of the debt owed by national legislation to local experiment: "examples of the evolution of a law of settlement, the use of certificates, the development of an allowance system, the employment of paid overseers and the expedient of uniting parishes for the provision of workhouses, are all to be found in local records before their adoption at Westminster." (Marshall, "The Old Poor Law, 1662–1795," *Economic History Review*, Vol. VIII, pp. 38–47, at 38). "Indeed it was almost an axiom of the poor law legislation throughout the period 1662–1795 that nothing was made legal by the authority of Parliament until it had become an established practice in a considerable section of the community" (Marshall, *The English Poor in the 18th Century*, p. 128).

organised. For this organisation the schemes already operating in the more energetic towns served as valuable examples.

Section 6 of the Poor Relief Act, 1601, provided that

> " the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame and impotent person, . . . being of a sufficient ability, shall at their own charges relieve and maintain every such poor person, in that manner and according to that rate, as by the justices of peace of that county, where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed; upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein."

The corresponding section of the 1597 Act spoke only of " parents " and children, but a series of interpretative resolutions of the judges circulated between the two statutes contained a resolution that " By this word parents is understoode a father or a grandfather, mother or grandmother, being persons able." [10] Neither statute made any mention of the husband, since he was, and still is, at common law bound to maintain his wife: the wife's remedy was, and is, her common law right to pledge his credit for necessaries.[11]

The learned Lord Chief Justice observes that the 1601 Act did not provide for the parish overseers to recover the cost of any relief which they might give. While it is true that the statutes of 1597 and 1601 do not, *expressis verbis*, make any such provision, there is evidence that it was the practice of the justices at quarter sessions, upon complaint, to order a defaulting relative not only to maintain the poor person for the future, this order to maintain sometimes being quantified into a certain periodical sum, but also to repay money already expended by the overseers. An instance of this which occurs in the West Riding Sessions Records deserves citation *in extenso*—

> " Forasmuch as this Court is informed upon oath that one Issabell Taylor of Roust' within the parish of Gigleswicke, widowe, refuseth and denyeth to maintaine and provide for Roger Lupton and Issabell Lupton, two of her grandchildren, soe that they are like to become chargeable unto the inhabitantes of the parish of Tatam, in the county of Lancaster, where they are now settled, shee the said Issabell Taylor beinge of good abillitie and sufficiencie, ORDERED that the said Roger Lupton and Issabell Lupton shall be remainded and sent from Tatam unto the said Issabell Taylor at Roust', and

[10] See Leonard, *op. cit.*, pp. 134–5. S. 6 of the 1601 Act seems to have been interpreted as including *great*-grandparents: thus, *West Riding Sessions Records 1611–42* (Yorkshire Archaeological Society Record Series), p. 257 (order against a great-grandfather and two grandfathers for them to maintain three " younge children," one child being placed at the charge of each).

[11] An interesting recent example is *J. N. Nabarro & Sons* v. *Kennedy* [1954] 3 W.L.R. 296, where the costs incurred by a wife in proceedings under the Married Women's Property Act, 1882, s. 17, were recoverable from the husband as being necessaries for which his credit could be pledged.

there to be provided for and maintained by her, the said Issabell, as the lawe in that case hath appoynted, which iff the said Issabell Taylor shall refuse to performe then, upon complaint made to any of his Majesty's justices of peace, then the penaltie of the lawe in that case provided to be ymposed upon her, and it is further ordered that the said Issabell Taylor shall pay unto G. W. and J. E., being overseeres of the parish of Tatam, the summe of xl s. for their charges, expended in maintaineinge and provideinge for the said children since the death of John Lupton, their father, and in prosecucon against the said Issabell Taylor, or, upon complaint to any of his Majesty's justices of peace, shee to be taken bound to answeare the premisses the next sessions."[12]

From this clear instance of an order for arrears it would not seem unreasonable to infer the existence of a general practice for such orders to be made. A defaulting relative would also, of course, be subject to the statutory penalty—"the penaltie of the lawe in that case provided" referred to in the above record. Often, however, neither the penalty nor a justices' order for arrears or future payments could be invoked, because section 6 only imposed the obligation to maintain on those "of sufficient ability" to support it: the family at this period was very much an economic and social unit, in which, if one member were in need of relief, the other members were likely to be in equal need themselves and so outside the terms of the section.[13]

It was not until over two centuries later that stronger criminal sanctions were introduced against a person who wilfully refused or neglected to maintain his or her family. By section 3 of the Vagrancy Act, 1824, such a person might tread the rake's progress from "idle and disorderly person," through "rogue and vagabond," to "incorrigible rogue" upon a third offence.[14]

[12] W. R. S. R. 1611–1642, pp. 250–51. Instances of orders to maintain being quantified into a certain periodical sum occur at p. 185 (order against a father to pay maintenance of 20s. yearly for his two "poore children"), and p. 100 (order against a son to pay maintenance of 18d. monthly in respect of an "olde poore widowe"). For these references I am indebted to my colleague Mr. G. C. F. Forster, Knoop Research Fellow in Economic History in the University of Sheffield.

[13] This would be less true of the "illegitimate family"; thus, under the statutes relating to bastardy, maintenance orders were commonly made against the putative fathers of bastard paupers. And in the eighteenth century "a special activity of the zealous parish officer was his attempt to indemnify the parish at the cost of private individuals for the expense of maintaining particular paupers. This activity was practically confined to the case of illegitimate children, the family connections of ordinary paupers being usually themselves too nearly destitute to be worth proceeding against for contribution towards their support": Webb, *English Local Government*, *English Poor Law History*, Part I: "The Old Poor Law," p. 308.

[14] This triptych of villainy originated in the Statute 13 Geo. 2, c. 24. The National Assistance Act, 1948, s. 51, now replaces this provision of the Act of 1824.

By the nineteenth century,[15] however, the parish administration, costly and inefficient at its best, was breaking down; the increasing poverty was but inadequately relieved,[16] while the poor rates soared ever higher. The long-needed reform of the poor law by the Poor Law Amendment Act, 1834, to which the learned Lord Chief Justice next proceeds, shifted its administration from the overseers of the poor of the individual parish to Boards of Guardians for the "Unions" into which parishes were to be grouped by that Act, the whole country being centrally controlled by the Poor Law Commissioners in London. This process had already been foreshadowed in the Workhouse Test Act of 1722, which gave to parishes a permissive right to combine for the erection of workhouses; but the Act of 1834 compelled, not permitted, and related to the whole field of poor relief, not merely to workhouse erection.[17] It marked a new approach to the problem of the poor with the introduction of larger units administering more efficient, more humane relief.

It was the Poor Law Amendment Act, 1850, which first allowed the cost of maintaining a wife out of public funds to be recoverable from the husband by an order of the court, but only in the special case of a lunatic wife being maintained in an asylum or registered hospital at the charge of the Union.[18] A general statutory liability to maintain a wife was not imposed until the Poor Law Act, 1927, although the Poor Law Amendment Act, 1868, impliedly recognised the common law liability by section 33, which laid down that "when a married woman requires relief without her husband" the guardians of the Union or the overseers of the parish to which

[15] Of poor law in the eighteenth century the learned Lord Chief Justice makes no mention. This is not surprising, for the period from the Restoration up to the end of the eighteenth century is indeed a dark one in the history of English poor relief. The paternalism of the Tudor and early Stuart period, when the Privy Council effectively controlled the administration of relief by orders to the justices of the peace enforceable in its special courts, gave place after the Puritan Revolution to a period of "parochial *laissez-faire*." The Act of Settlement, 1662, was in part responsible for the maladministration of this period. This Act clung to the parish as the unit of poor law administration, but sought to define the responsibility of the individual parish by the doctrine of settlement: by complicated and artificial rules of this and later statutes every person was deemed to be settled in a certain parish, which was then to be responsible for his or her relief. This doctrine was counterbalanced by the doctrine of removal: a parish might shift its responsibility for such poor as were not settled there by removing them outside its boundaries, with consequent saving to the parish rate-payers. Throughout the eighteenth century quarter sessions were much occupied with inter-parochial litigation concerning settlement and removal. See Marshall, *The English Poor in the 18th Century*, *passim*.

[16] Hence the phenomenal growth of Friendly Societies in the late eighteenth and early nineteenth centuries as a form of self-help and mutual insurance: see Levy: *op. cit.*, pp. 142 *et seq.*

[17] Workhouses, modelled on the London Bridewell and erected in increasing numbers after 1722, were intended as places where the poor could be set on work, the fallacious belief persisting that they could be employed at a profit. When later in the century the fallacy was recognised, conditions in workhouses deteriorated so that they became "a parish bugbear to frighten distress from applying for relief": see Marshall: *op. cit.*, pp. 140 *et passim*.

[18] Poor Law Amendment Act, 1850, s. 5.

she became chargeable might apply to the justices to require the husband to show cause why an order should not be made upon him to maintain his wife, and the justices, "after a consideration of the circumstances of the case," could make such order as they thought proper. No mention is yet made of any corresponding obligation of the wife to maintain her indigent husband. Two years later, however, by section 13 of the Married Women's Property Act, 1870, a married woman having separate property was made liable to the parish for the maintenance of her husband.

The Poor Law Act, 1927, in consolidating the previous law, expressly stated in section 41 (1):

> "It shall be the duty of the father, grandfather, mother, grandmother, husband or child of a poor, old, blind, lame and impotent person, or other person not able to work, if possessed of sufficient means, to relieve and maintain such person."

The addition of the husband to the relatives mentioned in the Act of 1601 is noteworthy. The statutory liability of a married woman with separate property to maintain her husband was repeated in section 41 (4). After poor law administration had been transferred to county and county borough councils by the Local Government Act, 1929, the Poor Law Act, 1930, repealed the Act of 1927 but repeated the provisions of section 41 (1) and (4).[19]

Liability to Maintain under the National Assistance Act, 1948

There the matter rested until the National Assistance Act, 1948, replaced the old Poor Law and made the relief of the needy a national responsibility to be financed out of national, not local, funds and to be administered by a national Assistance Board in place of the local Assistance Boards set up in 1930. The Act of 1948 has now removed the obligation of children towards their parents in the matter of maintenance as well as that owed by or to grandparents. It reaffirms, however, the statutory obligation of parents towards their children, and that of the wife to support her husband, but the latter obligation is now imposed irrespective of whether the wife has property of her own or not.[20]

The obligation in respect of children is not, of course, new, but had been imposed by the earlier poor law statutes, thus filling a surprising gap in the common law. But the widening of the new statutory liability of the wife for the support of her husband is a revolutionary piece of legislation without warrant in previous poor law or common law: it marks indeed a further step towards that complete equality of the sexes before the law which has

[19] Poor Law Act, 1930, s. 14 (1) and (4). Law Reform (Married Women and Tortfeasors) Act, 1935, 2nd Sched., substituted "property" for "separate property" in s. 14 (4).

[20] See National Assistance Act, 1948, s. 42 (1) cited above.

characterised much of the legal development of the last century. The old common law liability of the husband towards his wife is now statutory, but it still remains subject to the former common law qualifications where the wife is adulterous or in desertion: the case of *National Assistance Board* v. *Wilkinson* so decides in its rejection of the argument that section 42 (1) imposes an absolute liability. But one can only conjecture whether these same qualifications will be applied, *mutatis mutandis*, where the wife fails in her statutory duty to support her indigent and erring husband. If, as Devlin J. says in his judgment in *Wilkinson's* case, "It would be unjust if a husband were compelled to support a wife in open and admitted adultery," then equally a wife should not be compelled to support an adulterous husband. For the wife, however, no appeal to earlier case law is possible, save by way of analogy, to support any qualification on what appears in the statute to be her absolute liability. In *Wilkinson's* case counsel for the husband indicated this problem, and the learned Lord Chief Justice considered it impossible that Parliament intended the section in question to impose an absolute liability on either the husband or the wife.[21] Again, even if this argument be granted, to what extent is the parental liability to support children an absolute one? If a child persistently refused to live with its parents and as a result became in need of national assistance, could the Board recover the amount of the assistance given from the parents, notwithstanding their readiness to provide the child with a home?[22] If, as the Durham justices thought (and the Lord Chief Justice approved their thoughts in this), the court may take into consideration the conduct of the wife in refusing to join her husband when they are deliberating whether to make an order under section 43, similar conduct by the assisted child might well be relevant when an order was sought by the Board against the parents. But this part of the justices' reasoning, though not disapproved of by the Divisional Court, must be considered *obiter* in *Wilkinson's* case, as their main contention—that the liability of the husband under section 42 (1) is still subject to the old qualifications—was sufficient to dispose of the case in the opinion of the Divisional Court.

[21] At 659; *cf.* similar reasoning in *Taylor* v. *Perry* [1951] 2 K.B. 442, where it was considered impossible to hold that by an alteration of the Poor Law under the Act of 1948 the whole of the law relating to bastardy had been altered.

[22] No question of the liability of the husband for the maintenance of his children arose in *Wilkinson's* case since the report states that the husband continued to pay to the wife, despite her desertion, the sum of 15s. weekly for their only child, who remained in her custody. But it seems certain that, if no such payment had been made, so that extra assistance had had to be given the wife in respect of this child, the Board could have recovered such extra assistance from the husband, even though the wife were in desertion: the child would not have been identified with its deserting mother so as to lose its own independent statutory right of support. The Board appears to take this view: see Report of National Assistance Board for 1952 (Cmd. 8900).

The statutory obligations which section 42 places on members of the family are the more likely to be the subject of future litigation because of the general right to recoup itself which section 43 confers upon the National Assistance Board. If members of the family eschew court action to uphold their rights, the Board for its part can hardly shirk its duty of compelling the private pocket to reimburse the public purse: section 43, by a kind of statutory subrogation, provides the means so to compel, and *Wilkinson's* case suggests that the Board intends to use it.

The later case of *National Assistance Board* v. *Prisk* [23] provides an instance. Here a married woman, living apart from her husband by consent and receiving an inadequate sum by way of maintenance under the separation agreement, was assisted by the Board. The West Penwith justices dismissed two complaints of the Board who sought an order against the husband both for repayment of the assistance already given and for payment of weekly sums in the future. The Divisional Court (Lord Goddard C.J., Byrne and Parker JJ.) held in favour of the Board, since here, unlike in *Wilkinson's* case, the wife had not committed any matrimonial offence: the husband was still under his common law duty to maintain his wife, notwithstanding the separation agreement,[24] and his statutory duty under section 42 was only defeasible by the same defences as were open to him at common law.

A practical difficulty, however, in the way of such action by the Board is that it is often unable to trace the relative liable. Moreover, from a perusal of the reports of the Board (issued annually since 1948 [25]) it seems that the Board's policy is only to invoke section 43 where the wife will not herself bring normal maintenance proceedings against her husband, a course which the Board always advises and encourages her to undertake: in 1952, for example, the Board brought complaints under section 43 in only 42 cases. On the other hand, the number of prosecutions against husbands under section 51 for persistent refusal or neglect to maintain their wives and children has risen from 5 in 1948 to 212 in 1953.[26] The Board's reports mention no case of a complaint under section 43 or a prosecution under section 51 being brought against anyone except a husband.

In conclusion, one may observe that the liability to maintain which the National Assistance Act, 1948, now imposes on the husband and the wife in respect of each other and their children is

[23] [1954] 1 All E.R. 443.

[24] Following *Tulip* v. *Tulip* [1951] P. 378; *Dowell* v. *Dowell* [1952] 2 All E.R. 141.

[25] Cmd. 7767, 8030, 8276, 8632, 8900, 9210.

[26] A recent example is briefly reported in *The Manchester Guardian*, December 14, 1954, where, on three separate charges of neglecting to maintain himself, his wife, and his three children, the defendant was sentenced to a total of six months' imprisonment.

but the counterpart *inter vivos* of that statutory liability to provide for one's dependants after death by which the Inheritance (Family Provision) Act, 1938, has qualified the testamentary freedom of the common law.[27] Neither statute makes any distinction between the sexes in the matter of liability; but just as the courts have been slow to accede to applications under the 1938 Act against the estate of a female deceased,[28] so the policy of the Board may be averse to pressing home the statutory liability of the wife to maintain her husband and children in the rare cases where compulsion is necessary and possible.

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[27] But "dependants" include (*inter alia*) sons up to the age of twenty-one and daughters until marriage, so that the *post-obit* liability under the 1938 Act is wider than that *inter vivos* under the 1948 Act, where the term "children" is limited to those under sixteen years of age (s. 64 (1)).

[28] See *Re Sylvester* [1941] Ch. 87; *cf. Re Styler* [1942] Ch. 387.

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TRUSTS OF IMPERFECT OBLIGATION

The Problematic Decision

In *Re Astor's Settlement Trusts* [1] the shares of the company owning *The Observer* newspaper were settled upon trust to apply the income, which should arise from the shares during a period within the perpetuity rule, towards such scheduled purposes as the settlors should direct, and, on the determination of such period, to hold capital and income upon certain residuary trusts in favour of objects at present unascertainable. Any interests which the settlors might have thereafter retained by resulting trusts through uncertainty were settled, by a second settlement, upon charitable trusts. It was common ground that the scheduled objects in the first settlement were not charitable, and on originating summons it was claimed by the trustees of the second settlement, and by the Attorney-General for the charities, that the trusts of the first settlement failed for uncertainty and through the non-existence of a *cestui que trust* to enforce them. Roxburgh J. held that the trusts, not being charitable, failed for uncertainty, so that there was a resulting trust under the second settlement. On this point the case is unexceptionable, but the learned judge also decided the case upon the prior ground that trusts of imperfect obligation are invalid. The upshot of the case is therefore that an arrangement is not a trust if it cannot be the subject of litigation to enforce it. This is on the ground that, as the system of rights known as a "trust" is not a creature of statute or of the common law, but is the product only of the extraordinary jurisdiction of the Chancellor, no arrangement can be called a "trust" unless it can be brought before the purview of the Chancellor or of his judicial heirs and successors. A trust is a confidence protected by equity. An arrangement of confidence, without a *cestui que trust* who can ensure that protection, is an arrangement of confidence not protected by equity, and thus, so it is said, outside the very definition of a trust. Whilst, however, there have been dicta bearing somewhat obliquely on this point before, the first principle of whether or not there must always be an available *cestui que trust* had never before received such direct pronouncement. It is the purpose of this article to inquire into whether this pronouncement can be supported from the learning on this question which existed before it.

Cases in Support

Superficial authority in plenty can be found to support the proposition that if a trust cannot be enforced it cannot be recognised. A

[1] [1952] 1 Ch. 534.

century and a half ago, in *Morrice* v. *Bishop of Durham*,[2] Lord Chancellor Eldon said, at 539:

> "As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under their control . . . a trust therefore, which, in case of maladministration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained upon principles familiar in other cases, it must be decided that the court can neither reform maladministration, nor direct a due administration."

To Lord Eldon, therefore, it could be said, it was axiomatic that "the execution of a trust be under the control of the court." Similarly in *Bowman* v. *Secular Society, Ltd.*,[3] Lord Parker said:

> "A trust to be valid must be for the benefit of individuals . . . or it must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable."

To Lord Parker, then, it could be said that it was a rule that if there was no one to commence litigation, whether a specific *cestui que trust* or, if none, the Attorney-General, there could not be a valid trust. Thus it would follow that where a beneficiary was both unspecified and outside the scope of that class of unspecified objects on whose behalf the Attorney-General would intervene, *i.e.*, an unspecified uncharitable object, then the trust fails for want of a *cestui que trust*. In recent years, also, Harman J. had said, in *Re Wood*[4]:

> "There is an earlier obstacle which is fatal to the validity of this bequest, namely, that a gift on trust must have a *cestui que trust*, and there being here no *cestui que trust* the gift must fail."

This formidable authority repays a deeper inspection. The issue in *Morrice* v. *Bishop of Durham* was the effect of a gift to "such objects of benevolence and liberality as the trustee in his own discretion shall most approve." There is no difficulty today in stating quite categorically that such a gift is not a charitable bequest and accordingly fails for uncertainty of objects. In that light Lord Eldon's remarks take on a different character. The decision is simply that, as no one can say exactly what "benevolence" or "liberality" constitute, no one can say either whether any payment out of the trust funds is or is not a payment to an object of the trust. In these circumstances the court is unable to control its administration. The existence of a trustee's discretion is not generally regarded as removing the difficulty. The discretion must be exercised in a fiduciary manner and the propriety of any exercise of it must therefore be measurable. This is impossible if the scope

[2] 10 Ves. 521.
[3] [1917] A.C. 406, at p. 441.
[4] [1949] Ch. 498, at p. 501.

of the trust is indefinable. From this it emerges that it is not unenforceability for its own sake, but unenforceability for uncertainty which renders the trust invalid. As Lord Eldon says in the passage from his judgment quoted, " unless the subject and the objects can be ascertained upon principles familiar in other cases." In *Re Macduff*,[5] Lindley L.J. expressly quoted the passage above referred to and explained it, " Therefore, when we are dealing with general words, we must consider whether there is such an indication of purpose or of trust that the court if called upon to execute it can see what it has to do." We must consider, it will be seen, not " whether the court can be called upon to execute it," but " whether the court if called upon to execute it can see what it has to do." That is an issue of certainty not of enforceability. Similarly further on in *Morrice* v. *Bishop of Durham*, Lord Eldon said,[6] " the testator has expressly said, it is a trust, and the trustee consequently takes, not for his own benefit, but for purposes *not sufficiently defined* to be controlled and managed by this court." Further support for this view is also to be found in *Thomson* v. *Shakespeare*.[7]

The issue in *Bowman's* case [8] was the validity of a bequest to the Secular Society, Ltd., and the problem before the House was whether the Society was illegal or not. However, purely by way of *obiter dicta*, Lord Parker discussed the question of whether or not a trust for the objects of the Society would have been valid.

On this he was of opinion that the objects would have failed for uncertainty and could not have been saved in this respect by the lifebelt of charity, for whatever else they were the objects were not charitable. It is in the portion of his judgment dealing with the issue of certainty that one comes across the statement, above quoted, that a trust to be valid must be for the benefit of individuals or be charitable. As Lord Parker is most clearly dealing not with unenforceability but with uncertainty, one can only find it most difficult to resist the temptation to equate " individuals " with " ascertainables." What Lord Parker meant, in context, is, it is submitted, that if a trust is to be valid it must be for something specific or something charitable. The issue of enforceability appears nowhere in *Bowman's* case or in Lord Parker's judgment and the term " individuals " cannot be limited to human beneficiaries in this context, especially if that term is directed to the question of certainty. A gravestone, or a monument, or a hospital bed cannot be said to be individual persons, but they are certainly individual things and they are certainly ascertainable. Lord Parker's thesis appears to be only that a gift to the Society on trust for its objects would be void, because a trust to be valid must be certain or

[5] [1896] 2 Ch. 451, at p. 463.
[6] At 543.
[7] Johns. 612, at 617, 618.
[8] [1917] A.C. 406.

charitable. He does not concern himself here at all with the problem raised by the absence of an available litigant.

We are left with *Re Wood*.[9] There the testatrix had taken advantage of a practice of the B.B.C., whereby they chose each week a different philanthropic society and allotted time for a broadcast appeal in its favour. It was the intention of the testatrix that whatever cause was the subject of such an appeal in any particular week should that week receive a fixed donation from her trustees. To that end she bequeathed a sum of money to her trustees, to be invested by them in such a manner that a fixed annual income would be available to cover the donations. The issue in the case was the validity of this bequest, and it was declared invalid because the causes for which the appeals were made were not necessarily charitable in the legal sense. As Harman J. says,[10] the gift

> "is wholly uncertain and has no object, no *cestui que trust*, which is either certain or can be made certain by the directions which the testatrix has given. It can only be made certain by the decision of some third party. That is a delegation of testamentary power."

It can be seen that it was not the absence of a litigant which caused the trouble in this case, but rather the fact that it was not possible to tell *from the will* what the objects of the bequest were. It is only in the case of a charitable bequest that the objects of the bequest may be narrowed into what the law regards as certainty otherwise than by the testator in due conformity with the Wills Act, 1837.[11]

We are really again in the dark forests of uncertainty, because "A testator cannot simply say: 'I give part of my estate to the B.B.C. if and when they shall decide on any Sunday during the next twenty-one years to issue an appeal on behalf of some cause or other and I am willing to leave to them the entire discretion as to which cause it is.'" That is why "there is no *cestui que trust* here, and the gift must fail on that ground."[12] There is, of course, no objection to a perfectly general *power*[13]—and, therefore, an uncertain trust of income could be saved by a gift over transforming

[9] [1949] Ch. 498.

[10] At p. 502.

[11] It is interesting to compare *Re Wood* with *Re Ogden* [1933] Ch. 678, which was a case of a gift to be distributed in the trustee's discretion among "federations, associations or bodies in the United Kingdom" formed for "the promotion of Liberal principles in politics." The trustee's discretion was sufficient to narrow down the possible objects of the gift into certainty, because some indication of the testator's intention, beyond a general desire to "do good," had been shown, and sufficient certainty as to the ultimate objects existed therefore on the face of the will itself. Further, the trustee's affidavit showed that he could ascertain all the possible bodies from amongst whom the selection might be made. The degree of certainty with which the identity of the beneficiary can be ascertained from the will is the basis of the validity of the discretionary trust also.

[12] *Per* Harman J., at p. 501.

[13] Neither is there any objection to such a power under the Wills Act, 1837, see s. 10.

the uncertain *trust* into a certain *power* in which, if no direction under the power is made, the intermediate income which has not been allocated to the purpose objects goes to a specific beneficiary.[14]

It would not be accurate to leave *Re Wood* here. Unlike Lord Eldon and Lord Parker, Harman J. did quite plainly show that he also had in mind the point that even a certain object, which could not enforce its equity, was an insufficient object to constitute a valid trust. In dealing with the Irish case of *Re Kelly*,[15] which was a bequest for the maintenance of certain dogs for twenty-one years and which had been held valid, Harman J. pointed out that the case was confined to the issue of perpetuities. He drew attention to the fact that the judge therein "quite plainly hinted that a dog could not be a *cestui que trust*. There was not a *cestui que trust*, and if that point had been taken the gift must have failed." Whatever the nature and quality of the Irish judge's hints to this effect, there can be little doubt about the nature and quality of Harman J.'s contribution to this end. On the issue of whether or not a dog can be a beneficiary, the hints in *Re Kelly* are opposed by the *ratio decidendi* of *Re Dean*,[16] of which more will be said later, where a gift to certain horses and hounds was held to be valid. However, Harman J. assumes—though as *obiter*—that the gift would be invalid if it were unenforceable.

Apart then from *obiter dicta* in *Re Wood*, it appears to be an over-simplification to assume that where there is no person or charity named as the object of the gift, there is no valid gift. From the examination of the authorities in favour of this proposition, it appears that the invalidity springs only from the vagueness of the form which such bequests usually take. The trap of uncertainty is continually being met with in any discussion of void bequests and a closer look at the matter is necessary. Certainty is in law a god demanding constant sacrifices. It has *two faces*; *the first* is where the objects of the trust are too vague for the court to decide whether any given payment of trust money is right or wrong, because, not knowing the objects of the trust, the court cannot say whether the object benefiting by the payment in question is an object of the trust or not. This difficulty can be overcome where the vague objects constitute a "charity" as the law understands that term. Subject to the second form of uncertainty, the widest possible terminology and the vaguest indication of a testator's wishes will suffice in the case of a charitable trust—"for such charitable purposes as my trustees shall think fit," "for the furtherance of religious and mental improvement," and even for "my country England."[17] But the freedom accorded to charitable bequests must

[14] See *Re Park* [1932] 1 Ch. 580.
[15] [1932] I.R. 255.
[16] 41 Ch.D. 552.
[17] See *Mills* v. *Farmer* (1815) 1 Mer. 55; *Re Scowcroft* [1898] 2 Ch. 638—still held to be charitable even though the testator had given expression to such an "uncharitable" thought as the suppression of intoxicants; and the chauvinistic: *Re Smith* [1932] 1 Ch. 153.

not degenerate into such an anarchy of words that there is no longer a charitable bequest. This is *the second* face. Consequently, a gift " for such charitable or benevolent purposes as my trustees shall think fit," is so wide that it embraces objects of benevolence, and these are not composed exclusively of objects charitable in the legal sense—see *Att.-Gen. for New Zealand* v. *Brown*.[18] Similarly a gift " for the happiness of mankind " or for " patriotic purposes " [19] is too uncertain to be charitable, and, not being charitable, fails for uncertainty. As we have seen, it is uncertainty of objects which is constantly invalidating trusts, and not the inability of such objects to enforce such equitable rights under the trust as they might have had were they capable of adequate definition.

Cases to the Contrary

The doubtful nature of the authority in favour of the decision in the *Astor* case [20] has now been seen. If correct, the case would mean that even assuming the draftsman had overcome the long arm of uncertainty and the entwining web of perpetuity, the gift would still fail if the Court of Chancery could not be invoked by the beneficiary. Certainly there is little doubt but that the *Astor* case was rightly decided. The non-charitable objects of the trust clearly failed for uncertainty. But suppose that the scheduled objects had been certain? Here the second and more doubtful aspect of the *Astor* case becomes relevant. The authorities which stand against that second part of the case, dealing with this question of enforceability, will now be examined. In *Re Dean* [21] the court had upheld a trust in respect of an annual sum of £750 for the maintenance of " my eight horses and ponies (excluding carthorses) at Littledown and also my hounds in the kennels there," and for the maintenance of " the stables, kennels, and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit." There can be no doubt that such a bequest was neither for the benefit of any human person nor charitable, but the trust was in favour of specified individual animals and, the objects being certain, there was a valid trust, even though one could hardly expect the beneficiaries to go to law. North J. said quite categorically,[22]:

> " It is said that there is no *cestui que trust* who can enforce the trust, and that the court will not recognise a trust unless it is capable of being enforced by someone. I do not assent to that view."

and again [23]:

> " If such persons could not enforce the trust, still it cannot

[18] [1917] A.C. 393.
[19] *Brown* v. *Yeall*, Reg.Lib.A. 1790. fol. 579: note (3) to 7 Ves. 35: *Att.-Gen.* v. *National Provincial & Union Bank of England, Ltd.* [1924] A.C. 262.
[20] [1952] 1 Ch. 534.
[21] 41 Ch.D. 552.
[22] At p. 556.
[23] At p. 557.

be said that the trust must fail because there is no one who can actively enforce it."

Roxburgh J., faced with this decision in the *Astor* case, said of it [24]:

> " North J. did undoubtedly uphold the particular directions, whether or not they could be ' actively enforced.' But putting it at its highest, he merely held that there were certain classes of trusts, of which this was one, in which that objection was not fatal. He did not suggest that it was not generally fatal outside the realms of charity."

Whatever may be thought of the particularity or otherwise of North J.'s remarks (and the mere choice of examples does not necessarily limit the expounded proposition to the examples chosen to illustrate it), Roxburgh J. does not at this point indicate what are the bounds of the " certain classes of trusts " where the absence of an available litigant is not fatal. Later,[25] the learned judge treats the *Re Dean* class of trusts as " anomalous," and indicates agreement with Sir Arthur Underhill's statement " that they may be concessions to human weakness or sentiment (see *Law of Trusts*, 8th ed., p. 79 [26])." The promptings behind the rule may be many and varied, but it is respectfully submitted that a much more solid boundary to the " certain classes of trusts " would be the borderline between the certain and the uncertain object. In this way invalidity may be based upon uncertainty, and the introduction of sophistries as to enforceability and the clear effect of *Re Dean* is avoided.

Roxburgh J. proceeds to deal in the *Astor* case with no less than five cases in support of *Re Dean*,[27] where the courts upheld certain but unenforceable trusts as valid. This does not exhaust the list; there is the *Re Chardon* [28] group for the upkeep of graves, there are *Adnam* v. *Cole*,[29] *Trimmer* v. *Danby*,[30] *Masters* v. *Masters* [31] and

[24] At p. 544.
[25] At p. 547.
[26] But Underhill treats this class of trusts as quite valid, and the suggestion as to human weakness arises in an effort to distinguish these trusts from capricious trusts—see, *e.g.*, *Brown* v. *Burdett* (1882) 21 Ch.D. 667, where X devised Blackacre to trustees to seal up the property for 20 years, and then to convey the same to Y for life remainder to Z in fee. Bacon V.-C. held that the property went as on intestacy for the first 20 years. The distinction might well be that *Brown* v. *Burdett* turned, not upon enforceability, but upon the point that the direction in question was *void as being contrary to public policy*, the courts having always taken the view that the whole community has an interest in the due use of private wealth and set their faces against its waste. Hence the Perpetuity and Inalienability Rules, and see the judgment of Bacon V.-C. in the case, at p. 673 " I think I must ' unseal ' this *useless*, undisposed-of property." If this case is not one of enforceability, Underhill need not explain it, or, at least, in order to do so he need not limit the general manner in which he treats unenforceable trusts as being valid.
[27] *Pettingall* v. *Pettingall*, 11 L.J.Ch. 176—(Quaere perpetuities here): *Mitford* v. *Reynolds*, 16 Sim. 105—(a case brought repeatedly before the courts and the Lord Chancellor); *Pirbright* v. *Salwey* [1896] W.N. 86; *Re Hooper* [1932] 1 Ch. 38; and *Re Thompson* [1934] Ch. 342 (the fox-hunting case).
[28] [1928] Ch. 464.
[29] 6 B. 358.
[30] 25 L.J.Ch. 424.
[31] 1 P.Wms. 421.

Musset v. *Bingle* [32] —four more monument cases—and there appear to be other cases where the unenforceable trust has either been admitted as valid, or assumed as such by the court whilst argument was directed to quite other ends.[33]

The views of the jurists also seem on balance to favour the validity of the trust of imperfect obligation. Though Gray [34] is in support of the view that unenforceable trusts are void, his argument is based on *Morrice* v. *Bishop of Durham*, and the doubtful nature of that case as an authority for the proposition advanced by him has been discussed above. The cases to the contrary are regarded as exceptions or bad law, but his list of exceptions is so long and detailed as to lead one to doubt what is exception and what is rule. D. C. Potter [35] supports the opposite view to that taken by Gray, and, whilst disagreeing with Mr. Potter in his attempt to equate discretionary and unenforceable trusts, the present writer respectfully agrees with the conclusion reached by him,[36] that the argument for the validity of unenforceable trusts is " worth pressing in those cases where a testator has made his meaning perfectly clear, but has named no person to be beneficiary, and has not framed the gift so as to be charitable." Professor Glanville Williams also supports this view of the problem,[37] and extends his argument to some classes of uncertain trusts, also. Dr. Kiralfy [38] says of unenforceable trusts:

> " The law has seen fit to permit a testator to direct the application of the income of his property by his executors or trustees to some sufficiently defined *purpose*, provided it is limited to the period allowed by the rule against perpetuities."

(The emphasis is that of the present writer.) Dr. Kiralfy regards the unenforceable trust as more in the nature of a power, but makes no dispute as to its validity. Finally, Mr. Hart [39] also supports the validity of unenforceable trusts, concluding [40] that:

> " The law has now reached a stage in which a non-charitable purpose trust may be good though there are no ascertained individuals capable of enforcing its execution."

[32] [1876] W.N. 170.

[33] See for example *Re Cleveland Literary & Philosophical Society's Land* [1931] 2 Ch. 247; *Re Moore* [1901] 1 Ch. 936; *Re Nottage* [1895] 2 Ch. 649; *Re Drummond* [1914] 2 Ch. 90; *Re Price* [1943] Ch. 442; *Trustees of the British Museum* v. *White*, 2 S. & S. 594; *Thomson* v. *Shakespeare*, 1 De G.F. & J. 399, and especially *Mellick* v. *President and Guardians of the Asylum*, Jacob 180. See also *Re Prevost* [1930] 2 Ch. 383—gift to general purposes of an unincorporated voluntary society, held valid even though the society was not charitable. The gift to the society may, however, have been a gift to its members individually in this case—see *infra* in this article for a fuller discussion of this point.

[34] 15 Harv.Law Review 509.

[35] 13 Conv.(N.S.) 418.

[36] At p. 425.

[37] 4 M.L.R. 20.

[38] 14 Conv.(N.S.) 374.

[39] 53 L.Q.R. 29.

[40] At p. 33.

The Cases to the Contrary Distinguished and Objections to that Distinction

As a result of such a phalanx of authority, one would have thought that a trust, within the perpetuity rule and for a certain, though unenforceable, object, was clearly valid. The cases in favour of this proposition, however, were distinguished by Roxburgh J. in the *Astor* case [41] on the ground that, in those cases, there were residuary beneficiaries who were interested in the surplus remaining after the immediate legacies had been paid, and who thus constituted available machinery for bringing the administration of the trusts before the court. As the residuary interest in the settlement before him was at present unascertainable, that factor did not exist in the present case, and the trust failed.

There are two objections to this argument. *First* not all the cases against the *Astor* case are ones in which residuary interests existed, and they cannot all, therefore, be distinguished on that ground. In *Re Dean* [42] there could not be any possible power of enforcing the trust, because it expressly declared, "my trustees shall not be bound to render account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion." In the annuity charged on the estate for the benefit of the testator's animals, therefore, no one was entitled by right to the surplus. No one, therefore, had any interest, or any *locus standi*, in coming before the Chancery to complain that too much money had been spent on the animals, and to ask that the trustees be brought to account. North J. makes that quite plain in his judgment.[43] In *Adnam* v. *Cole*,[44] also, it was the surplus residuary estate, itself, that was to be laid out in erecting the monument, and again there could be no question of enforceability by a party indirectly interested. *Secondly*, it is submitted that the presence of residuary interests does not, in any event, perfect an otherwise imperfect obligation. In *Pettingall* v. *Pettingall*,[45] for example, the residuary legatees, who are eventually to receive the sum set aside for the maintenance of the testator's black mare, but only as and when such sum is set free by that animal's death, are given, during its life, the right to require information as to the state of the mare's well-being, with liberty to apply. There is small likelihood that anyone will be over-zealous to keep the mare alive. The order does not, and cannot, ensure that the equity be enforced. There still remains the fact that, in such an event as the gross underfeeding of the animal, the only person with any interest in bringing the breach of conscience before the court is a somewhat disgruntled

[41] [1952] 1 Ch. 534.
[42] 41 Ch.D. 552.
[43] At pp. 561–2.
[44] 6 B. 358.
[45] 11 L.J.Ch. 176.

black mare. The force behind an order such as the one in question is, presumably, that the trustee is always kept under control by the thought of the residuary legatees, who are ever ready to step forward to lodge their claim upon the trustee's failure to execute the trust. This is hardly conducive to the execution of the trust, and the residuary legatees, who would only be entitled if the trust were not fulfilled, would be hardly likely to insist on its fulfilment.

It is respectfully suggested that if a trust which does not possess a *cestui que trust* is void, then it is void. One cannot supply a *cestui que trust* for the immediate gift by supplying one for the gift over on its cesser. In the end, one cannot help feeling that the real ground of Roxburgh J.'s decision against unenforceable trusts was that it would be impossible "to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control." One can feel sympathy with this common-sense summary, and, in truth, the upshot of the decisions seems to show that it is mainly in the cases of trifling expenditure, on the protecting of pets and the impressing of posterity, that one can frame a non-charitable trust with that degree of certainty which the Chancery requires. Other attempts fail because the larger the vision the vaguer the objects, and, in practice, the more the lack of control is frightening, then the greater is the probability of uncertainty. It is in this rather than in any absence of residuary interests that the seeds of invalidity lie.[46]

The foregoing objections to the *Astor* case, however, do not mean that it can be ignored as a precedent. Even though the decision is only by a court of first instance, and even though it may be in conflict with other decisions, yet, as a result of it, we now have judicial authority to the effect that a court of equity will not recognise, as an equitable obligation, a direction to apply property "in furtherance of enumerated non-charitable purposes in a manner which no court or department can control or enforce." [47]

The Effects of the Decision

It is now intended to indicate two important reasons why this position is unfortunate. (1) *First*, as a direct result it seems to follow that no voluntary society, which is not legally charitable and which is not legally incorporated, can hold assets, whether real or personal, through the medium of trustees, even though its objects are

[46] The inability of a non-charitable body of fluctuating membership to take a presumed charitable trust in equity depends also upon uncertainty and not unenforceability. The fiction is needed because there can be no prescription at law where there is no legally recognisable grantee. In equity, the profit claimed must be at least as adequately definable as a custom. It is noteworthy, however, that the objects of a presumed charitable trust are not always objects "charitable," and thus enforceable in the strictest sense—see *Goodman* v. *Mayor of Saltash* (1882) 7 App.Cas. 623.

[47] *Per* Roxburgh J. at p. 547.

certain or it, itself, is so. The one exception, perhaps, is where there is a gift over to residuary interests—when at once there yawns the pit of perpetuity. No organisation, from cricket clubs to cemeteries, from bulldog breeders to boys' brigades, from museums to Masons, can possibly figure as the objects of a valid trust. Similar considerations arise in the case of land where it is to be held—and, more serious, where it actually is held at the present—by trustees for a local non-municipal museum, workmen's hall or territorial association, and for every kind of unincorporated non-charitable society of certain object. It is especially hard upon sects which rely upon the organisations of their own separate communities to provide many of the necessary amenities those communities require. If the communal bodies of such sects serve a non-charitable purpose the relevant trustees will be holding their respective premises under void trusts, and thus on resulting trusts for the, probably untraceable, subscribers to their purchase in proportion to the subscriptions made. Worse still, if an asset is the voluntary donation of an individual person now deceased, the trustees will, in the result, hold on resulting trust for his legatees or devisees, who may be both rapacious and uninterested in the particular cause.

At first sight it may seem that the above is an over-statement of the difficulties involved. Three alternative answers to the problem suggest themselves, namely, (a) that if the trust object is a body such as a youth club, it can be represented by an executive committee, (b) that in the case of a gift to such a body, the same may be a gift to the members of that body, and (c) that an answer may be provided by statute. These suggestions will now be examined. The first one proceeds upon the argument that, as the void nature of unenforceable trusts springs from the practical difficulty of the representation of the beneficiary in court, no trust, therefore, is invalid for want of a *cestui que trust* if it is in favour of an unincorporated body *and* if that body possesses the machinery for the election of representatives to appear for it. If, however, the court were to allow a suit brought by such persons, it would be recognising the agents of a legally non-existent principal. There seems to be more authority for waiving the necessity of enforceability as a condition of validity than there is for waiving the rules as to what are legal personae and what are not. If a beneficiary has no theoretical existence, then that beneficiary cannot appoint agents to enforce its interests, which must remain unenforceable.[48] Turning to the next argument, which

[48] In tortious and contractual actions involving unincorporated clubs, the courts have enforced the liability of the actual persons concerned in the tort or contract, and, in some cases the liability of the members, at the *relevant* time to the extent of their subscriptions. The courts have also recognised the rights and the liability of the executive committees—sometimes on the ground of agency and sometimes upon that of vicarious liability. These decisions afford no ground for recognising such committees

is that such conveyances, whether voluntary or for value, can be said to be held on trust for the individual members of the society, one finds this to be very thin in the case of a large organisation. It would probably only be upheld where the organisation, by definition, comprises but a small group—*e.g.*, "To the Marist Sisters of the Convent of Carrick-on-Shannon"—see *Bradshaw* v. *Jackman*.[49] Similarly *Brown* v. *Dale*,[50] where the proceeds of sale of the premises of an unincorporated guild were divided amongst the members. However, as the members consisted only of the plaintiff and the defendant, the case is not of very persuasive authority. It is, of course, on similar grounds that trusts for partnerships are valid—these being on the same footing as the common trust for sale found in the case of a beneficial joint interest. The position as to validity, however, might be different in the case of a gift "To the Trustees of the High Street Hall Youth Club," where members may constantly change as age limits are reached and so forth. The trust for the members individually will be more easily inferred, however, where it is one of liquid assets than where it is of fixed assets intended for the permanent and continuing benefit of the institution—future members as well as present. In fact, the question whether a gift to a society can be treated as a gift to its members will depend in each case upon the size of the society, the nature of the gift, the terms of the constitution of the society—including especially its winding-up provisions—and the terms of the gift. This can hardly be regarded as a safe or certain basis upon which to place the ownership of property. Neither is it very satisfactory for the purchase of premises for a society to be dependent upon the society's right to dissolve itself, and to share the proceeds of the sale of the premises. Indeed, it may often be desirable that a gift to a society be framed in such a manner as to ensure that, within the inalienability rule, the same be on some permanent basis, a procedure which would be fatal to any attempt to validate the gift to the society on the ground that it was a gift to the members. Further under the *Astor* case, no trust for the individual members could possibly be argued at all in cases relating to such organisations as zoos, museums, cemeteries, and so forth.

Lastly, it is necessary to consider an important statutory provision. By section 29 of the Settled Land Act, 1925, land held

as being available for the enforcement of an equitable trust right vested in their clubs, even if such a right is taken to be a *jus in personam* against the trustees and not a *jus in rem*. Even if the rights of the club under the trust are rights *in personam*, they are nevertheless antecedent and not remedial, and it would be unwise to place a continuing right savouring of proprietorship upon the same basis as ones which are purely tortious or contractual.

[49] 21 L.R.Ir. 12. The specific description is important in spite of the religious nature of such a trust as, though religious, it is probable that such a gift is not now charitable—see *Gilmour* v. *Coats* [1949] A.C. 426.

[50] 9 Ch.D. 78.

on " charitable, ecclesiastical or public trusts or purposes shall be deemed to be settled land," the trustees are given all the powers of a tenant for life of settled land, the trust instrument is deemed to be the settlement and the trustees to be the trustees of the settlement. What exactly constitutes a " public " or " ecclesiastical " trust without also constituting a " charitable " trust is not made clear, but the available candidates cannot be very numerous. What is quite clear, however, is that the section will not validate an otherwise invalid trust of land, and, simply because the trust is public, it does not follow that a valid settlement under the Settled Land Act exists. In *Re Cleveland Literary and Philosophical Society's Land*,[51] the land of an unincorporated association was declared to be held on valid public trusts under the section, but in that case the issue of enforceability was not canvassed, and the case is more one throwing doubt on the principles of the *Astor* case than it is one establishing section 29 as an exception to them.

Were the position otherwise, a non-charitable trust which was void for uncertainty would blossom forth as a valid settlement if only its objects were public. The real purpose of the section is to indicate the manner in which the trusts to which it relates will, if they are otherwise valid, fit into the new scheme of land law laid down at the time. In the result, under the *Astor* case, the position of non-charitable voluntary societies is, to say the least, an anxious one.

The *second* source of trouble arising out of the case concerns the position of a trustee who has already paid over the trust property in pursuance of the trust. Prior to the *Astor* case, when it was generally assumed that trusts for ascertainable objects within the perpetuity rule were valid even if unenforceable, funds, which it now appears ought properly to have been applied as residue (or, if the trust were of residue, as on intestacy), have been continually and serenely applied in pursuance of the objects directed by the testator. It would seem that the twin millstones of *Hilliard* v. *Fulford*[52] and *Re Diplock's Estate*[53] must logically now descend upon trustee and mistaken recipient alike to grind them into bankruptcy and dissolution. Not only does the misapplied capital become repayable, but the trustee may also be faced with a claim for interest thereon, and, because the *Diplock* right is akin to a right *in rem*, that interest will run from the date of the incorrect payment and not merely from the date of judgment. The injustice is terrible to contemplate, and the safety net of section 61 of the Trustee Act, 1925, inadequate.[54] In the event, the *Astor* case does not only affect the liberal zeal of an enlightened newspaper,

[51] [1931] 2 Ch. 247.
[52] [1876] 4 Ch.D. 389.
[53] [1948] 1 Ch. 465. See now *Ministry of Health* v. *Simpson* [1951] A.C. 251.
[54] Nor does the Charitable Trusts (Validation) Act, 1954 which is solely concerned with specific cases of uncertainty, remedy the effects of unenforceability.

but it can react also upon the credit and rectitude of every man and woman who give of their time and service in voluntary work for others.

Suggested Solutions

1. *The Imperfect Obligation as a Power*

The arguments for and against the decision in the *Astor* case[55] have now been examined, objections to those arguments have been listed, and the unfortunate nature of the decision indicated. It is now proposed to discuss other questions which have arisen with regard to trusts of imperfect obligation, but which were not dealt with in the *Astor* case. The greatest theoretical obstacle, blocking the path to the recognition of the validity of unenforceable trusts, is the difficulty of finding the beneficial ownership in such a trust. The *legal* title of the trustee does not carry the beneficial ownership with it, and neither does the *equitable* title for that is not vested in any person who is recognised as capable of ownership. In an endeavour to answer this question it has been suggested[56] that there is no "trust" at all, but merely a "power." This makes it possible to argue that the trustee does not hold on an *obligatory trust* for any beneficiary, that the purpose objects are not "trust" interests at all, and that it is entirely up to the trustee whether he applies the trust property towards them or whether he holds it for the donor on default.

In theory, however, there are objections to this classification. First it must be pointed out that in the obscure no-man's land between the "trust" and the "power" one thing is a certain indication of a trust, and that is the absence of express default provisions and of gifts over. In such cases, the courts will recognise a hybrid "trust-power," and aid the fulfilment of an obligation which has been imperfectly carried out. The courts will indeed even go so far as to exercise a power where the trustee has, himself, made no attempt at all to do so. This is on the ground that the exercise of the power is obligatory, and clearly shows that the tendency of equity is rather to class powers as trusts than it is to class trusts as powers.

The nature of the duty created by such a gift is at the root of the whole matter. A power would make the trustee's duty optional: a trust would make it obligatory. Consequently, three doubts emerge against the theory of a "power." First, the absence of default provisions seems to indicate that the purpose objects are mandatory and without alternative. Secondly, in the case of a power unaccompanied by default provisions, the donor's interest in the settled property is not exhausted, and his right to receive unapplied income pending appointment is contemplated by him.

[55] [1952] 1 Ch. 534.

[56] See, for example, Professor Ames, "The Failure of the 'Tilden Trust,'" 5 Harv. Law Review 389. See also Dr. Kiralfy in 14 Conv.(N.S.) 374.

In the case of an unenforceable trust, however, the settlor's interest in the property is entirely exhausted, and any new interest accruing to him in unapplied income arises outside the trust entirely, upon its failure and after it has ended. Thirdly, there is a further pointer to be found in the question of certainty. A gift " to A in trust for such persons as he shall by will appoint," and accompanied by provisions for the application of the income pending appointment and of capital and income in default, is valid. On the other hand, a gift " to A in trust for any objects he may care to select in his absolute discretion " is invalid. Therefore, as the question of certainty has arisen in those cases where an unenforceable trust has been held to be valid, it seems clear that the subject of discussion needs to be certain, and therefore savours more of a trust than of a power.

Whilst it makes little difference to the enforceability of the gift if it be regarded as a trust or as a power, nevertheless, on the whole, the argument for a power does seem to involve too great a distortion of its terms.

2. *The Imperfect Obligation as a Trust without a Beneficiary*

In the end the problem of the beneficiary must be dealt with on the footing of a trust and an obligation. On this basis, there comes at once the great argument against the *Re Dean*[57] group of cases, namely, that if a trust is an obligation, how can a gift creating no obligation be a trust? It is at these points that the absence of codification is felt, for in the absence of authoritative definition all is a quicksand.

It seems that the answer should be that equity recognises the unenforceable obligation because, as the beneficiary is a volunteer whom equity will not aid *for his own sake*, it is the confidence or " trust " reposed in the trustee by the settlor which equity, as a court of conscience, will not allow to be abused. It is the trustee's conscience *to the settlor* to which the Chancery directs its attention. Therefore the presence of a beneficiary is indeed immaterial as long as there are a settlor and a trustee, and the necessary certainties. Indeed, the want of a trustee, even, is not necessarily fatal. Equity will always provide a trustee, for what matters is that the intention of the settlor should be enforced by equity should equity be called upon to do so. It is as if the testator said to the trustee, " I give you this property, and I ' trust ' you not to use it for your own use, but to apply it to this certain specified object." The nature of the object (if it be not remote, uncertain or illegal), does not affect the case. Neither does the absence of an equitable title, because where there is a legal title fastened with a confidence—" a trust "—surely, if words mean anything, there is a trust.[58] Although the settlor, having parted with his interest in

[57] 41 Ch.D. 552.

[58] It may be that unenforceable obligations were recognised in the case of charitable bequests, before the institution of the Attorney-General's right

the property, has himself no proprietary right to enforce, yet it is through his merit, rather than through the beneficiary's that equity acts against the trustee, for, the trustee having been chosen by the settlor, it was by him that he was "trusted."

3. *The Trust without a Beneficiary as a Voidable Trust*

Having now argued that the theoretical obstacles to the recognition of the validity of unenforceable trusts are not insurmountable, it is necessary to indicate the nature of that trust which is to arise if an unenforceable trust is assumed to be valid in this way, and is then, in fact, not carried out. It does not appear that failure to carry out a valid but unenforceable trust will cause a resulting trust to the settlor. This would happen if such trusts were regarded as invalid, and there is generally some difference in the law between the effect of that which is valid and that which is void. In the result, it appears that the income cannot be claimed either by the settlor (who has successfully parted with his interest in it), or by the trustee (who does not hold beneficially), or by the beneficiary (who cannot enforce his interest). It may be that the income in such a case would belong enforceably to no one if the trust were followed, and that, consequently, if the trustee does not choose to carry out the trust, it *becomes* void on the ground that it is contrary to public policy to render a portion of the national wealth *useless*, even for a period within the perpetuity rule. Authority for the statement as to public policy is to be found in *Brown* v. *Burdett*,[59] where the courts invalidated a devise of property to trustees on trust to seal up the same for twenty years before conveying it to a remainderman, and there is more than a hint of such a policy in the *Astor* case. Also, of course, there is no anomaly in a trust, or for that matter in a contract, which can be performed in a valid or in an invalid manner. Such a trust is not invalid until the invalid mode of performance is actually chosen.

In such a case the presence of a settlor's estate, into which the avoided interests can fall, supplies residuary interest such as Roxburgh J. insisted on in the *Astor* case.[60] The interests do not render the trust any the more specifically enforceable, and if specific enforcement is insisted upon the trust must remain void *ab initio*, but they do provide alternative ends to which the trust property may be applied if, being valid, the trust is not executed. No very alarming difference appears, therefore, between the trust if valid and

to intervene for their protection. After all, the Charitable Uses Act, 1601, which is the starting-point of present-day charity law, had more to it than a definitive preamble. It was passed to ensure the enforcement of charitable bequests by the State because, so it states, charitable gifts were being kept for the private use and benefit of the trustees. The Act does not validate such trusts, therefore, presumably, prior to it the gifts were valid but unenforceable—see *Anon.*, 1 Ch.Ca. 267, but see *Att.-Gen* v. *Newman*, 1 Ch.Ca. 157.

[59] (1882) 21 Ch.D. 667.

[60] [1952] 1 Ch. 534.

the trust if void. The distinction is that, in the former case, a conscientious trustee may execute the trust if he wishes—the courts will " wait and see."

Conclusion

In conclusion, it is submitted that the true position is at present as follows—

(1) A trust whose administration cannot be brought before the court (*quaere* if this includes a gift to an unincorporated society) is generally not to be upheld, even if certain and within the perpetuity rule: *Re Astor's* [60] *Settlement*;

unless (*a*) it is of a class of trust already recognised as anomalous —in effect for monuments, graves and well-loved horses and hounds —*Re Dean*,[61] *Mitford* v. *Reynolds* [62] (certainly if there are residuary interests following upon the building or maintenance of such objects);

or, perhaps, (*b*) in any event if there are residuary interests—*Re Astor's Settlement*.

But if *Re Astor's Settlement* can be distinguished as being a case on uncertainty, or if it is not followed, such trusts, even if outside the " anomalous " classes, should all properly be valid if certain and within the perpetuity rule, the sanction being criminal—see Larceny Act, 1916, s. 21. Letting the criminal law deal with fraudulent breaches of trust and misappropriations, and turning to the case of the trustee who merely neglects the settlor's wishes, such a failure to carry out the trust would, upon the present hypothesis, cause not a resulting trust but an illegality, and any unapplied income would be applicable as if the trust were void. The residuary interests then arising would not render the trust enforceable, but would lay the ghost of income permanently in suspension on the failure of the trust.

(2) In any event, on the assumption that *Re Astor's Settlement* is to be upheld, the courts, whilst they will nip an unenforceable trust at its inception at the behest of the residuary legatees or devisees, or of next-of-kin in a proper case, and whilst they will even bring to an end one that has been continued in a trustworthy manner for years in accordance with the testator's directions, yet, where a trust is for certain objects and within the perpetuity rule, they will not treat, as a misapplication, any application of funds *already* made thereunder. The trust is not void under the *Astor* case, but only voidable. The defect in the trust is simply that, if ever a call for control came, that call could not be answered. The continuation of the trust into the future cannot be allowed without a guarantee that it will be specifically performed. It is because, and only because, no enforceable guarantee to this end can be given that the objection under the *Astor* case arises. Therefore it is the prospective nature of

[61] 41 Ch.D. 552.
[62] 16 Sim. 105.

the trust which is suspect and at fault, not its past application, the nature and condition of which the court knows. There is no objection to the past application of the funds to the proper ends envisaged by the trust up to judgment (or interlocutory injunction), and, even upon the present hypothesis, the same is no breach of trust.

The above would seem to be the legal position relating to the matter. The defect in the obligatory nature of the trust is not a contradiction in terms, for it is not the obligation but its enforcement which is at fault. The difficulty is practical not theoretical. However, the position is ripe for review. Little credit is done to a system of law when, after centuries, it cannot define with certainty the fundamental essentials of one of its primary concepts, and, at this stage of legal development, it should not be necessary for the lawyer to still have need to ask " what is a trust ? "

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THE ADVANTAGES OF THE DECLARATORY JUDGMENT IN ADMINISTRATIVE LAW

Although the declaratory judgment has, in recent years, been employed more readily in administrative law, the remedy has not yet attained the pre-eminence in this field that its considerable advantages would seem to merit. The fundamental point is that coercive relief is generally unnecessary against public and governmental authorities—normally, a declaration of the law is enough and no coercive backing is needed to compel officials to observe the law or to remain or be kept within the bounds of legality. Public bodies in Britain would never blatantly disregard an authoritative declaration of the law obtained against them. Morever, the limitations besetting the prerogative orders of mandamus, certiorari, and prohibition, remedies which do give coercive relief, and the doubts as to their precise scope, are such that these remedies compare unfavourably with the simplicity of the declaratory judgment procedure.

In an age when, in more and more fields of activity, an individual's action is liable to bring him into conflict with the Administration, there is a very real need for a simple all-embracing method of redress, unencumbered by restrictions such as have attached themselves over a long period of development to the older remedies. Bringing a declaratory action is, further, the best way to avoid the loss of a case on the ground of wrong choice of remedies.

It is now proposed to outline some of the disadvantages of mandamus, certiorari, and prohibition, the older remedies available in public law, and to compare these remedies with the action for a declaratory judgment.

I—The Disadvantages of Mandamus

If an authoritative declaration of the law is obtained against a government department, local authority, or other public body, that body is not likely to disobey it. An order of mandamus, which compels the performance of a public duty is, therefore, generally unnecessary, and the conditions for its grant being, as we shall see, somewhat technical, a declaration should usually be preferred.

The most recent definitive statement on the scope of mandamus was made by Lord Goddard C.J. in *R.* v. *Dunsheath, ex p. Meredith* [1]—

> "Mandamus . . . will be granted if the duty is in the nature

[1] [1951] 1 K.B. 127, 131.

of a public duty and specially affects the rights of an individual, provided that there is no more appropriate remedy."

It will be seen that mandamus lies only to compel the performance of an imperative duty and not therefore where there is any discretion in the performance of that duty. Further it lies only for non-performance of the duty or where performance is in "such an illegal or perfunctory manner that there is in fact no performance,"[2] as in *R.* v. *Bowman*.[3] In that case, it was held that mandamus lay to compel justices to hear an application for a licence according to the law after they had made a decision in the matter but had taken extraneous considerations into account. Abuse of discretion was treated as non-exercise of discretion.[4]

Admittedly, a few of the disadvantages of mandamus have disappeared since the Act of 1938[5] which relieved it of some of its procedural technicalities, but many disadvantages remain.

One disadvantage is that mandamus is only available if there is no other equally appropriate remedy. In the recent case of *R.* v. *Dunsheath, ex p. Meredith*, Lord Goddard C.J. did say at one point that the plaintiff merely had to show that there was no more appropriate remedy available, which is the test for the exercise of the court's discretion in an action for a declaration; he followed this up, however, by reverting to the established test for mandamus of "no other equally appropriate remedy."[6]

In an article describing the widening scope of mandamus and the other prerogative orders, Dr. Schmitthoff admits that mandamus deals only with the negative aspect of non-performance of a public duty and that it does not generally enable the court to control the positive aspect of wrongful exercise of the duty.[7]

Because mandamus is limited generally to non-performance of a duty there are many cases where it cannot be obtained against public authorities for *ultra vires* acts. For example, in *Att.-Gen.* v. *Guardians of the Poor Law of Tynemouth*,[8] the defendants had passed a resolution cancelling the balance of loans owing to them in respect of the relief granted to miners' wives and families during

2 Dr. Clive M. Schmitthoff, "The Growing Ambit of the Common Law," in 29 *Canadian Bar Review* (1951), p. 469, at 475.

3 [1898] 1 Q.B. 663, 667.

4 If a tribunal gives reasons for a decision which are wrong in law, the availability of mandamus depends on whether the reviewing court holds that wrong considerations were taken into account or that there has, otherwise, been an abuse of discretion. The grant of certiorari, however, will depend simply on whether the reasons were set out in a "speaking order" (see *infra*) unless the error can be considered to amount to an excess of jurisdiction. Mandamus may therefore be both narrower and wider than certiorari. See Griffith and Street, *Principles of Administrative Law* (1952) p. 230.

5 The Administration of Justice (Miscellaneous Provisions) Act, 1938, 1 & 2 Geo. 6, c. 63. See also R.S.C., Ord. 59.

6 See *Pasmore* v. *Oswaldtwistle U. D. C.* [1898] A.C. 387, and *R.* v. *Bedwellty U. D. C.* [1934] 1 K.B. 333.

7 Schmitthoff, *loc. cit.*, p. 475.

8 [1930] 1 Ch. 616.

the General Strike of 1926. The Attorney-General, acting at the relation of the corporation of the borough owning rateable property within the defendants' area, was able to obtain a declaration that the resolution was *ultra vires* the defendants. There was no question of the defendants not having performed some public duty which alone would ground mandamus.

Mandamus is of no use where the public authority is not under a duty but merely has a power. In *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [9] the local authority had power to permit cinemas to open on Sundays " subject to such conditions " as they saw fit to impose. Leave was given to the plaintiffs to open on Sundays provided that no children under fifteen years of age were admitted. The plaintiffs endeavoured (unsuccessfully as it happened) to show that the local authority had acted unreasonably in imposing this condition. Proceedings for mandamus were not available to them, as the local authority was under no " public duty," and so a request for a declaration that the local authority had acted *ulra vires* was the obvious simple way of raising the issue.

Professor Schwartz [10] points out that probably only a declaration is available to review purely legislative acts such as delegated legislation.

It was mentioned in *Att.-Gen.* v. *Dean and Chapter of Ripon Cathedral* [11] that mandamus would not lie to compel the performance of a continuous series of operations but that a declaration might be available for an interpretation of the authority by which it was alleged that that series of operations was required.

It has long been determined that mandamus does not lie against the Crown nor against Crown servants acting as agents of the Crown.[12] The application of this rule was limited by the decision in *R.* v. *Commissioners for Special Purposes of the Income Tax*,[13] where it was held that a servant of the Crown who also had a public duty, statutory or otherwise, to perform in which a member of the

[9] [1948] 1 K.B. 223. The decisions of licensing justices and of most other licensing bodies are " judicial " so certiorari may have lain in this case, See Lord Goddard C.J.'s judgment in *R.* v. *Brighton Borough JJ., ex p. Jarvis* [1954] 1 W.L.R. 203, 206. It was considered to be a " judicial " function in *R.* v. *L. C. C., ex p. The Entertainments Protection Association* [1931] 2 K.B. 215; there is a criticism of that case by D. M. Gordon, in 10 *Canadian Bar Review* (1932), p. 980. However, although the decisions of licensing justices are subject to control by certiorari there seems to be no case where certiorari has been used to challenge the mere " unreasonable " exercise of discretion in the way that the declaration was employed in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation*. It is exceedingly difficult to separate the twin problems of scope of review and methods of review in the judicial control of the Administration.

[10] Bernard Schwartz, *Law and the Executive in Britain* (1949), p. 162.

[11] [1945] 1 Ch. 239.

[12] See for example *R.* v. *Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387.

[13] (1888) 21 Q.B.D. 313, 317.

public had an interest, could be ordered by mandamus to perform that duty.

It is not clear whether a plaintiff is required to have a greater interest when asking for mandamus than when he is seeking a declaration. Professor Wade [14] asserts that, in mandamus, a plaintiff must show that a "duty is owed to himself and not merely to the public at large"; if this were so, it would be rare indeed for a plaintiff to obtain a mandamus under the principle of *R.* v. *Commissioners for Special Purposes of the Income Tax*. If Professor Wade is right in this, a request for a declaration would have a distinct advantage for the plaintiff in such a case since he would then only have to show that his interests were in some way affected by the acts complained of even though his interests were affected no more than those of other members of the public, and he could show no special duty owed to himself. Nevertheless, it is doubtful whether Professor Wade is correct in his assertion that in suing for mandamus a plaintiff must show that the defendant owes a special duty to the plaintiff.[15] Several cases [16] have held that it is sufficient if the applicant for mandamus shows that he has some special interest in the subject-matter. There lies the real difference between the remedies; in a declaratory action a plaintiff merely has to show that his interests were sufficiently affected by the acts complained of. In mandamus, on the other hand, an applicant must show that he is, in some way, specially affected more than the rest of the public.

It would appear that section 21 (2) of the Crown Proceedings Act, 1947,[17] has no effect on the general rule that mandamus is not available against the Crown or against Crown servants acting only as agents of the Crown.[18] It was doubtful before the Crown Proceedings Act whether a declaratory judgment was available against the Crown where the matter might later be the subject of a petition of right.[19] Now that petitions of right have been abolished, the

[14] E. C. S. Wade, "Courts and the Administrative Process," 63 L.Q.R. (1947), p. 164, at 170.

[15] See Griffith and Street, *loc. cit.*, pp. 230–1, and Street, *Governmental Liability* (1953) pp. 137–9.

[16] *R.* v. *Cotham* [1898] 1 Q.B. 802; *R.* v. *Leicester Guardians* [1899] 2 Q.B. 632; *R.* v. *Manchester Corporation* [1911] 1 K.B. 560. There are only *obiter dicta* in favour of Professor Wade's view—*R.* v. *Lewisham Union* [1897] 1 Q.B. 498 and an unreported dictum of Channell J. cited (with approval) by Avory J. in *R.* v. *Manchester Corporation* [1911] 1 K.B. 560, 564.

[17] 10 & 11 Geo 6, c. 44. By s. 21 (2) the court will not grant "any injunction or make any order against an officer of the Crown if the effect of granting an injunction or making an order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

[18] This is the view of Professor Glanville Williams, *Crown Proceedings* (1948), and of Professor H. Street, "Crown Proceedings Act, 1947," in 11 *Modern Law Review* (1948), p. 129; *contra*, Dr. Schmitthoff, *op. cit.*

[19] See dicta of Farwell L.J. in *Dyson* v. *Att.-Gen.* [1911] 1 K.B. 410, 414, and in *Eastern Trust Co.* v. *Mackenzie, Mann & Co.* [1915] A.C. 750, 759; also Rowlatt J. in *Bombay & Persia Steam Navigation Co., Ltd.* v. *Maclay* [1920] 3 K.B. 402, 408. In three cases, however, where a petition of right could have lain, no objection was raised to actions for a declaration:

problem no longer arises.[20] A declaration is now, therefore, always available against the Crown.

II—The Disadvantages of Certiorari and Prohibition

The orders of certiorari and prohibition are "limited to curbing the exercise of judicial and quasi-judicial powers."[21] They are not, however, limited to supervising established courts of law. Atkin L.J. (as he then was) in *R.* v. *Electricity Commissioners*[22] said that certiorari lay—

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority."

The courts can, nevertheless, determine in any case whether a power is or is not "judicial"[23] though there has been little clarification from the Bench on the question of who has the "duty" to act judicially. Recently, Parker J.[24] (as he then was) asserted that the duty to act judicially might arise in the course of arriving at a decision based wholly or partly on grounds of "policy," for example, a Minister's decision to confirm a clearance order. However, the procedure required to be followed must be analogous to the judicial, though the final decision may wholly or partly be based on policy. There is still no comprehensive definition of judicial duties. The problem does not arise in an action for a declaratory judgment which lies whether an administrative body's decision is "judicial" or is not.

Certiorari does not lie to supervise non-statutory domestic tribunals.[25] The declaration, however, has proved a very effective remedy in three recent cases concerning domestic tribunals.[26] As Denning L.J. explains in *Lee* v. *Showmen's Guild of Great Britain*[27] the power of the court to intervene is based on its jurisdiction to protect rights of contract. If a member of a union,[28] guild, or

Wigg v. *Att.-Gen. for the Irish Free State* [1927] A.C. 674, *Egan* v. *Att.-Gen.* [1931] A.C. 113, and *China Navigation Co., Ltd.* v. *Att.-Gen.* [1932] 2 K.B. 197.

20 See Glanville Williams, *op. cit.*, p. 90. But the courts may not give relief by way of a declaration binding on the Crown where what is asked for is a declaration not on a matter of general interest, but relating to a particular executive act against a particular individual; See Lord Greene M.R. in *Chaney* v. *Murphy* [1948] L.J.R. 1301, 1309.

21 E. C. S. Wade, *loc. cit.*, p. 170.

22 [1924] 1 K.B. 171, 205.

23 *Nakkuda Ali* v. *M. F. de Jayaratne* [1951] A.C. 66.

24 *R.* v. *Manchester Legal Aid Committee, ex p. Brand* [1952] 2 Q.B. 413.

25 *R.* v. *National Joint Council for the Craft of Dental Technicians (Disputes Committee), ex p. Neate* [1953] 1 Q.B. 704.

26 *Abbott* v. *Sullivan* [1952] 1 Q.B. 189; *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; *Baker* v. *Jones* [1954] 2 All E.R. 553.

27 [1952] 2 Q.B. 329.

28 In *Bonsor* v. *Musicians' Union* [1954] Ch. 479, the Court of Appeal by a majority (Denning L.J. dissenting) followed the law laid down in *Kelly* v. *National Society of Operative Printers and Assistants* (1915) 84 L.J.K.B. 2236, that an expelled or excluded member of a union could not sue the union for damages but only for a declaration or an injunction.

club, is expelled or excluded by a committee in breach of that body's rules, the court will grant a declaration that its action was *ultra vires* and can also grant an injunction to prevent his expulsion. In the case of statutory tribunals, certiorari lies as well as the declaration and injunction; in the case of domestic tribunals only a declaration and injunction will lie, but as Denning L.J. points out, the latter remedies are probably more effective.[29]

Devlin J. in the case of *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Zerek*[30] adverted to the principles governing certiorari and prohibition and said that they afforded "speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal."

A declaration of law as to the subject-matter in dispute may be obtained not only where there is "clear" excess of jurisdiction in the inferior court but also, it would seem, where there is mere doubt as to the jurisdiction; it is a matter for the court's discretion.[31]

It was decided in *R.* v. *Northumberland Compensation Appeal Tribunal*[32] that certiorari lay not only for excess of jurisdiction but also to examine a decision on its legal merits provided that the lower court has set out the grounds for its decision, *i.e.*, has made what is known as a "speaking order," and error of law appears on the face of the record. The courts have also been prepared to give advice to administrative tribunals on points of law when certiorari was ordered on grounds of excess of jurisdiction.[33] Even where no "speaking order" is made an order made by a lower court may speak by implication, and thereby jurisdictional facts, *i.e.*, facts which the tribunal must have assumed as being established in order to enable it to exercise jurisdiction, can be reviewed unless it is clear that Parliament intended the tribunal to be the sole arbiter of the question whether the conditions for the exercise of its jurisdiction were satisfied or not.[34] The extended

[29] In *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 346. See *infra*. The decision of a domestic tribunal on points of law, including questions of the interpretation of the rules of a club or association cannot be excluded from review by the courts, but in the so-called "club cases" the issue is usually only a matter of opinion as to whether a member has been guilty of conduct detrimental to the club, which issue is not reviewable. See Dennis Lloyd, "Judicial Review of Expulsion by a Domestic Tribunal," 15 *Modern Law Review* (1952) p. 413, at 421; and *Baker* v. *Jones* [1954] 2 All E.R. 553.

[30] [1951] 2 Q.B. 1 at 11, Devlin J.'s assertion that certiorari lay only for "clear" excess of jurisdiction seems to have no judicial backing.

[31] *Lord Auckland* v. *Westminster Local Board of Works* (1872) L.R. 7 Ch. App.Cas. 597.

[32] [1951] 1 K.B. 711. The decision of the Divisional Court was affirmed by the Court of Appeal—[1952] 1 Q.B. 338.

[33] *R.* v. *Paddington Rent Tribunal* [1949] 1 K.B. 666, 684.

[34] *R.* v. *Ludlow* [1947] 1 K.B. 634, 640. This would appear to be the rule with regard to declarations also: *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721.

scope of certiorari does go some way toward meeting the suggestion often made [35] that there should be an absolute right of appeal to the ordinary courts of law on all questions of law. But, as Morris L.J. pointed out in *R.* v. *Northumberland Compensation Appeal Tribunal*,[36] certiorari will not issue as the

> "cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity or absence of or excess of jurisdiction, where shown."

There is no decision to the effect that a declaration that an inferior court's decision was wrong in law is limited to cases where the inferior court's reasons are set out in a written "speaking order" and error appears on the face of the record. Indeed, Denning L.J. says in *Lee* v. *Showmen's Guild of Great Britain* [37]—

> ". . . the remedy by declaration and injunction . . . can be as effective as, if not more effective than, certiorari. It is indeed more effective because it is not subject to the limitation that error must appear on the face of the record."

Denning L.J.'s dictum was given in a case concerning a domestic tribunal only, but in *Barnard* v. *National Dock Labour Board* [38] the Court of Appeal upheld a grant of a declaration that a statutory tribunal's decision was wrong in law though the error was not apparent on the face of the record. The London Dock Labour Board having purported to delegate some of its powers under the Dock Workers (Regulation of Employment) Scheme, 1947, to the port manager, the port manager served notices of suspension on the plaintiffs whose appeals to an appeals tribunal were dismissed. Holding that the Board had no power to delegate their disciplinary powers under the scheme the Court of Appeal ruled that the notices of suspension were invalid and declared that the appeals tribunal's decision to the contrary was wrong in law. The error of law in this case was not one apparent on the face of the record and hence certiorari would not have lain in this case. The plaintiffs indeed did not know it was the port manager who had purported to suspend them till they obtained discovery of documents in the action for a declaration.[39] There is no discovery in certiorari proceedings.

This case is not positive authority for the proposition that a declaration is available wherever a statutory tribunal has made an

[35] See for example the Report of the Committee on Minister's Powers (1932), Cmd. 4060, p. 117, and R. C. Fitzgerald, "Safeguards in the Exercise of Functions by Administrative Bodies," 28 *Canadian Bar Review* (1950) p. 538, at 562.

[36] [1952] 1 Q.B. 338, 357.

[37] [1952] 2 Q.B. 329, 346.

[38] [1953] 2 Q.B. 18.

[39] In any case, as Singleton L.J. mentions, certiorari would not have lain because the plaintiffs did not know of the illegality till after the time for the order had run. See *infra* re limitation of actions.

error in law not going to its jurisdiction and not embodied in a "speaking order"; the Court of Appeal merely took it for granted that the method of action employed was unobjectionable and did not go into the merits of the method. Only Denning L.J. *obiter* expounded the merits of the declaratory action. Nor does it mean that any person dissatisfied with an administrative decision can successfully petition for a declaration. It is true, however, that Denning L.J. asserted:—"I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself . . ."[40] and its wide scope might invite abuse. Still, the remedy is discretionary and as Sir Carleton Allen has pointed out[41] it seems improbable that High Court judges will allow it to be abused by frivolous and unmeritorious litigants. The case has served to illustrate the great advantage of the declaration in cases where limiting rules prevent the employment of the prerogative remedies.

It is not easy for the High Court to claim jurisdiction where statute has given exclusive jurisdiction on a particular matter to a statutory tribunal or Minister. As Hallett J. said in *East Midlands Gas Board* v. *Doncaster Corporation*,[42] "The courts have no jurisdiction . . . to determine that which Parliament has said shall be determined by some other person or body." Nevertheless that person or body usually has to make its determination in accordance with some specific regulations and a misinterpretation of them is a question of mixed law and fact which could be brought before the High Court in an action for a declaration. In the recent case of *Healey* v. *Minister of Health*[43] the Minister determined under his statutory powers that a hospital employee was not a "medical health officer" within the relevant regulations. The employee asked the High Court for a declaration that he was a "medical health officer." As Cassels J. pointed out, the question he was asked to decide was the very one which statute had said the Minister was to determine and that there was no provision for appeal in the Act or in the regulations. However, it may well be that if the statement of claim had been framed to the effect that the Minister had misconstrued the regulation giving the definition of a "medical health officer" the High Court could have gone into this question of mixed law and fact and given or refused a declaration on the merits. Only if there was no definition or the Minister's decision was purely discretionary would the decision be unassailable in the High Court. The Court of Appeal upheld the judgment of Cassels J.[44] and Denning L.J. clearly implied that, if

[40] [1953] 2 Q.B. 18, 41. See a note on this case by Mr. S. A. de Smith in 16 *Modern Law Review* (1953) pp. 506–9.
[41] See his note in 69 *Law Quarterly Review* (1953) pp. 451–3.
[42] [1953] 1 All E.R. 54, 57.
[43] [1954] 2 All E.R. 580.
[44] [1954] 3 All E.R. 449.

the plaintiff had sought a declaration that the Minister's determination was invalid in law, the High Court could have reviewed the issue; Morris L.J. left the matter open on the ground that the plaintiff had not pleaded that the Minister's determination was wrong in law. Parker L.J., however, without considering the cases, rejected the view for which we have contended and which Denning L.J. seems to support.

The extended scope of certiorari to examine a decision on its legal merits in no way meets the other suggestions made[45] that there should be set up a Supreme Court of Administration to hear appeals on matters of fact. Clearly, neither certiorari nor the declaration does or should enable findings of pure fact by a statutory tribunal to be reviewed by the courts except where those findings are held to go to the jurisdiction of the tribunal.[46]

A further advantage of the action for a declaratory judgment is that, except in the case of an application by the Attorney-General, acting on behalf of the Crown,[47] an application for certiorari must be made within six months of the date of the proceedings which it is desired to question.[48] An action for a declaration is only subject to the usual period of limitation of three years. Before the Law Reform (Limitation of Actions, etc.) Act, 1954, repealed the Public Authorities Protection Act, 1893, and section 21 of the Limitation Act, 1939,[49] an action for a declaration where those Acts applied had to be brought within one year.

Summary of the Advantages of the Declaratory Judgment

To summarise, the advantages of a declaration over mandamus are:—(a) mandamus is, apparently, available only if there is no other equally appropriate remedy whereas the declaration will not be refused unless there is a more appropriate remedy; (b) mandamus lies only for non-performance of a public duty and does not, therefore, lie to supervise the mode of exercise of many administrative powers; (c) probably, it is easier for the plaintiff to show sufficient "interest" in the subject-matter to maintain an action when he is seeking a declaration than when he is asking for mandamus; and (d) mandamus does not lie against the Crown, but a declaratory judgment does.

The advantages of a declaratory judgment over certiorari (and prohibition) seem to be the following: (a) certiorari and prohibition lie only to supervise "judicial" and "quasi-judicial" acts; (b)

[45] See for example Professor W. A. Robson, *Justice and Administrative Law*, and Sir Carleton Allen's preface to Sieghart, *Government by Decree* (1950) p. xiii.

[46] See *supra*, p. 143.

[47] *R.* v. *Amendt* [1915] 2 K.B. 276.

[48] Rule 4 (2) of the Rules of the Supreme Court, Divisional Court.

[49] Neville J. had held in *Att.-Gen.* v. *West Ham Corporation* (1910) 26 T.L.R. 683, that the special limitation in respect of public authorities applied even though the action was only for a declaration.

these remedies cannot lie against non-statutory domestic tribunals; (c) possibly,[50] certiorari and prohibition lie only for "clear" excess of jurisdiction but it seems that the declaration will lie even where the jurisdiction is merely doubtful; (d) certiorari lies only to review the merits of a decision if the error appears on the face of the record; and (e) in respect of limitation of actions. The absence of coercive effect may exceptionally be a difficulty but it is considered that such a case would be rare and if the prerogative orders could not lie a new form of remedy such as a decree of annulment or injunction would be required.[51]

Professor Friedmann[52] points out that a more general use of the declaratory judgment would make it possible in most cases to dispense with certiorari and prohibition and "thus reduce the importance of one of the most vexed and disturbing problems of modern administrative law, the need to define the 'quasi-judicial' as distinct from 'administrative' functions of a public authority."

The technical limitations that have grown up round the prerogative remedies of mandamus, certiorari and prohibition constitute a grave stumbling-block for an intending plaintiff desirous of seeking redress against the Administration. They can, we believe, be largely avoided by a more ready use of the action for a declaratory judgment.

Gordon J. Borrie, ll.m.*

50 See Devlin J. in *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Zerek* [1951] 2 Q.B. 1, 11.

51 See S. A. de Smith, 15 *Modern Law Review* (1952) 189, at 207.

52 W. Friedmann, *Law and Social Change in Contemporary Britain* (1951) pp. 233–4.

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SOME LIFE INSURANCE PROBLEMS

It is surprising how little precise knowledge of life insurance the ordinary man or woman possesses. This remark applies, rather surprisingly, to very many solicitors. By precise knowledge, I mean knowledge of the best method to be adopted to secure a given result and the best office in which to insure.

If the maximum amount of protection for a man's dependants is desired, it is obvious that the type of policy which has the lowest premium is the one to choose. This is, of course, the whole life policy. The question then arises whether a with-profit policy (*i.e.*, one carrying bonuses) or a non-profit policy is the better.

Before considering this question, it may be helpful to say a few words about bonuses. They may be at simple or compound rates and may be declared after valuations made annually or at longer intervals, generally of three or five years. Where a simple bonus is added to the policy, it is calculated on the original sum assured, but where a compound bonus is added, it is calculated on the sum assured plus the bonuses already added.

A table of the annual reversionary bonuses of the various life offices is to be found on pages 56 to 61 in the current *Insurance Agent's Vade-Mecum*.[1] Tables showing the total amount of £1,000 policy increased by bonuses which are either (*a*) simple, (*b*) annual compound, (*c*) triennial compound, or (*d*) quinquennial compound, will be found in Stone and Cox's *Insurance Tables* (ordinary branch).[2] From these tables can be constructed one comparing the value of a £100 policy after say 30 years having a bonus of say £1 10s., paid in accordance with one of the four methods mentioned above as follows—

Simple bonus	£145 0s.
Annual compound	£156 3s.
Triennial compound	£155 3s.
Quinquennial compound	£154 3s.

There is thus very little difference between the results of calculating compound bonuses, but an office paying simple bonuses, in order to provide the same result as one paying compound bonuses, must either have a lower premium or pay larger bonuses or both.

A simple calculation comparing a typical non-profit policy with a with-profit one will provide an answer. Assume that the assured is aged 35 at his next birthday. His expectation of life will be 36·35 years on the basis of the 1924–29 Mortality Tables, which are those almost invariably used by British Life Offices.[3]

Assuming the annual premium for a policy for whole life for £100 with profits will be £2 16s. 2d. per cent. (This is the rate of one of the life offices.) This equals £2·808.

[1] Published annually, price 7s. 6d. [2] Published annually, price 6s. 6d.
[3] See table on page 73 of the *Insurance Agent's Vade-Mecum*.

It is necessary to ascertain the total amount paid in premiums, assuming that the premiums are compounded at some reasonable rate of interest. Three per cent. would be reasonable.[4] One pound sterling paid at the beginning of each year for 36 years (*i.e.*, the period of the expectation of life) and compounded at three per cent. per annum will amount to £65·17, ignoring the 0·35 of a year as it will not significantly affect the result.[5]

£2·808 × £65·17	say £183
Assuming a bonus of £1·13 per cent. per annum (the rate of the office in question) the total policy moneys receivable at the death of the assured, assumed to take place at the age of 71, will be	£177

Thus the total amount assumed to be paid, including compound interest on premiums, is £183 and the total amount received in policy moneys and bonuses is £177. The difference of £6 between these two amounts is the cost of the protection given by the policy (which seems to me to be uncommonly cheap for what it provides). Compare these figures with those of a similar non-profit policy in the same office. The premium for such a policy is £2 3s. 1d. per cent. In order to compare like with like it is necessary to ascertain what amount of cover a premium of £2 16s. 2d. per annum will provide. It will be £130·36.

Making the same calculation as above, *i.e.*, compounding the premiums at 3 per cent. per annum, the total will be:

	£183
Policy moneys	130·36
	£52·64

So that the cost of the protection given by a with-profit policy is £6 and of a non-profit policy is £52·64. There is, therefore, no doubt that a with-profit policy is by far the better.

As will be seen, these calculations are made on a very important assumption, *viz.*, that the assured lives for the whole period of his expectation of life. If, in the case mentioned above, the assured should die earlier than approximately 17 years after the date of the commencement of the insurance (*i.e.*, if the assured should die before reaching the age of 52), the non-profit policy will be the better and this difference in favour of this kind of policy will increase the earlier before 52 that the assured dies.

The question which anyone proposing to insure his life for the sole benefit of his dependants must ask himself is, therefore, do I wish to provide for a comparatively early death or do I expect to live out my expected term? And in accordance with his answer to this question he will take out a non-profit or with-profit policy.

[4] The method of assuming a rate of interest and treating the premiums as compounded at that rate is good actuarial practice, though if simple interest only is calculated, it will not affect the comparative result materially.

[5] See table on page 74 of the *Insurance Agent's Vade-Mecum.*

Whilst whole-life policies provide the greatest protection for the assured's dependants most people like to benefit personally from the savings they have made. This explains the popularity of endowment policies.

Policies of this class have two aspects in accordance with their *primary* object. This can either be family protection or investment. If the former, a long term endowment policy is the right one, since, for a given sum of money each year, the policy with the lower premium will provide a policy for a larger amount than one for a shorter term and therefore with a relatively higher premium.

On the other hand, since a rebate of income tax is allowed in respect of premiums up to seven per cent. of the amount assured, a policy regarded primarily from an investment point of view should be for a term of years corresponding with a premium of about £7 per cent. of the amount assured in order to take full advantage of the income tax rebate.

Many people experience great difficulty in deciding upon the merits of the life policy offered by one insurance company as compared with another or others. It seems to me that the test to be applied is to ascertain what is the cost of the protection provided by the policy. The formula for ascertaining this is to take the rate of premium per £100 for the required age, multiply it by the amount to which £1 paid yearly at the beginning of each year for the term of the policy will amount, if compounded at a reasonable percentage, which, of course, must be the same in each calculation. The total will be the gross cost of the insurance. From this should be deducted the aggregate amount of the sum assured plus bonuses and the balance will be the cost of insurance (less, of course, income tax rebate). The company which shows the lowest cost (or the largest credit in the case of a short term endowment policy) is, in my view, the best company with which to insure.[6]

The necessary tables to enable these comparisons to be made are:—

(1) Of premiums of the insurance companies;
(2) Of the bonuses these companies offer;
(3) Of the amount to which £1 paid each year in advance compounded at a given rate of interest will amount for any given number of years;
(4) Of the total amounts to which policies with compound bonuses of a given rate will accumulate;
(5) Of expectation of life; and
(6) Showing the decimal values of a £.

Tables 1 to 5 can be found in Stone & Cox's *Insurance Tables* or in

[6] It should be noted that a number of offices reduce the premium rate by sums varying from 1s. to as much as 6s. per cent. For this information see the notes at the foot of the tables of premiums for the various types of policy on pages 4 to 51 of the *Insurance Agent's Vade-Mecum.*

the *Life Insurance Agent's Vade-Mecum*, to which I have referred above. The latter is necessary as it gives the information required by Tables 1 and 2 above in a way which enables comparisons to be more readily made.

The following is an example of the method of comparison I have set out above. It is desired to compare the quotations of two life insurance offices for a with-profit endowment policy on the life of a man aged 35 maturing at 65. The annual premium of the first office to be considered is £3 10s. 10d. per £100 insured which equals £3·54. The sum of £1 paid in advance each year compounded at three per cent. will amount to £49 in 30 years, and $49 \times 3{\cdot}54 = £173{\cdot}46$. This company pays a compound reversionary bonus of £1 10s. with annual valuations. The total policy moneys will be £156·3. The difference between £173·46 and £156·3 is £17·16, which is the cost of the policy. The annual premium for a similar policy in another office is £3 18s. 8d. per cent. which equals £3·93. Compounded as above the total cost will be £192·57. This company pays a simple reversionary bonus of £1 6s. 0d. per cent. with an annual valuation and the total policy moneys will be £139. These last calculations require to be adjusted since the first premium is £3 10s. 10d. and the second £3 18s. 8d. The former is ·9007 of the latter. Adjusting the figures, the total to be debited will, of course, be £173·46 as before, but the total policy moneys will be £125·15 and the cost £48·31.

It should be emphasised that bonuses depend on profits and they again primarily depend on the capacity of any particular office to invest its funds to the best advantage. Whilst in times of financial stability such as existed in the halcyon days before the first German war policy holders could calculate what their bonuses would be likely to be with a very considerable degree of certainty, the same conditions do not obtain now. Having regard to the difficulty of foreseeing what the trends of investment are likely to be, especially a considerable number of years hence, some cautious insurers could with some reason argue that it would be wiser either not to rely on bonuses at all, in which case the non-profit endowment policy would be the logical form of assurance, or to rely on them only to a limited extent, from which it would follow that an office with a very low premium paying a small bonus at the present time would be chosen. If these considerations are to have weight, I prefer the latter method.

I hope that what I have said may be of some assistance, especially to young solicitors who may be, and indeed should be, thinking of insuring their lives. It may bring some precision into what is often treated in a rather hit-or-miss fashion. Whilst a short article such as this cannot, of course, deal fully with the subject, I believe the fundamental points have been dealt with.

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STATUTES

Charitable Trusts (Validation) Act, 1954

The Charitable Trusts (Validation) Act, 1954, must be one of the most remarkable Law Reform Acts ever passed by Parliament—remarkable as much for what it excludes as for what it contains. As a general rule one naturally expects that a Law Reform Act will alter the law for the future and in exceptional cases it may also operate retrospectively. The draftsmen of this Act, however, (following the recommendations of the Nathan Committee) have scorned this well-tried method, and have produced an Act which seems to be based on an entirely new conception of legislative policy.

The main provisions of the Act may be summarised as follows:

Dispositions of property for objects not exclusively charitable which took effect before December 16, 1952, are retrospectively validated. Thus a gift " for such charitable or benevolent objects as the trustees may select " (such as that held void in *Chichester Diocesan Fund* v. *Simpson* [1944] A.C. 341) is now validated. This validation is to have effect for the period before the commencement of the Act " as if the whole of the declared objects were charitable " (s. 1 (2) (*a*)), and for the period after that commencement " as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes " (s. 1 (2) (*b*)). This means that if, in the above example, the property had before the commencement of the Act been applied for charitable and benevolent non-charitable objects the application would be validated, while if no property had been applied when the Act came into force it may be validly applied for the declared charitable objects only.

The Act does not apply where any of the property has been paid to the person entitled by reason of the invalidity of the disposition (s. 2 (2)), nor does it prejudice the rights of any person so entitled if his right accrued less than six years before December 16, 1952, and he has given express notice of his claim to the persons administering the property (s. 3 (1)).

To the casual reader of the Act (if there be such a person) two questions at once present themselves: (1) Why is the Act retrospective, and in particular why was December 16, 1952, selected as the vital date? (2) Why does the reform not apply to future dispositions?

The answer to both these questions is to be found largely in the report of the Nathan Committee. In the first place the Nathan Committee was much concerned by the suggestion that many trusts

generally believed to be charitable were invalidated by the Court of Appeal's decisions in *Ellis* v. *I. R. C.* (1949) 31 T.C. 178 and *Oxford Group* v. *I. R. C.* [1949] 2 All E.R. 537, and they recommended that trusts of this type should be retrospectively validated if created before December 31, 1950, this being a reasonable time after these decisions became known. The Act extends the period of grace for nearly two more years, until the date on which the Government's acceptance of the recommendations of the Report on this question were announced, that is December 16, 1952.

In view of the emphasis (over-emphasis, one is inclined to say) placed by the Committee on the maxim that everyone is presumed to know the law, it is perhaps a little surprising that they recommend that there should be any retrospective legislation at all. It is, moreover, open to doubt whether the *Ellis* and *Oxford Group* cases laid down any new law. It is not without significance that neither of the cases appears in the *Law Reports*, and only one of them in the *All England Reports*.[1] But even if these cases did suggest that retrospective legislation was necessary the Act, again following the Committee's recommendations, extends to a vast number of cases as to whose invalidity there could never have been any doubt long before 1950. The Act applies to all dispositions under which "consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable" (s. 1 (1)). This opens the door to many cases which would have been held invalid as long ago as the beginning of the nineteenth century (see, *e.g.*, *James* v. *Allen* (1817) 3 Mer. 17), and whose invalidity has been put beyond doubt by several decisions of the House of Lords itself (*e.g.*, *Houston* v. *Burns* [1918] A.C. 337, and the well-known *Diplock* case [1944] A.C. 341).[2] Yet the policy of the Act is to validate dispositions made in ignorance of these cases while refusing to accord any such leniency to dispositions taking effect after December 16, 1952. Is one to assume, then, that solicitors who were ignorant of well-known decisions of the House of Lords will comb the pages of the Nathan Report for a statement of the law? And what of testators who draw their wills without legal aid? Is it seriously suggested that such testators are any better acquainted with the Reports of Committees on highly technical branches of the law (or of Government pronouncements thereon) than with the *Law Reports* themselves?

1 It may be noted that in *Royal College of Surgeons* v. *National Provincial Bank, Ltd.* [1952] A.C. 631, and *I. R. C.* v. *Glasgow Police Athletic Assoc.* [1953] A.C. 380 where the same point of law was discussed the *Ellis* case was not referred to at all and the *Oxford Group* case received only a single mention in the latter case in the speech of Lord Cohen.

2 It is, of course, true that many, perhaps most of these cases will be excluded from the Act by the effect of s. 2 (2) (*supra*), but the odd one may slip through.

Furthermore, the reason behind the Nathan Committee's recommendation logically requires that the Act should apply to instruments *executed* before the material date, irrespective of when they take effect. In point of fact, however, the Act only applies where the instrument *takes effect* before this date. It follows that many wills drafted before the *Ellis* and *Oxford Group* cases will not be saved by the Act at all, thus defeating the main object of the Committee's recommendation.

Passing to the second question, why is this reform not to apply to future dispositions? The answer again is that the Act follows the majority recommendation of the Nathan Committee in leaving such dispositions to the tender mercies of the law as it was before the Act. The arguments in favour of such a reform are best stated in the Report itself (paragraph 533): "The fine distinctions between what is and what is not charitable create serious difficulties in the drafting of gifts or bequests to charity. Yet many testators will continue to make home-made wills, and others, even though they consult the most astute and experienced lawyers, may have their wishes frustrated by a technical rule of law." The committee, however, rejected these arguments because (1) "the principle that every person must be presumed to know the law is fundamental," and (2) "testators would become uncertain of their position if the court were empowered to direct that a bequest partly to charity and partly to other purposes should be applied for charitable purposes only."

What do these arguments amount to? It is submitted that the logical conclusion of the first argument would be an almost complete abandonment of the law reform function of legislation. The argument in effect is that bad law is innocuous if known to be bad, but as experience has shown, this is far too optimistic an assumption. Why were sections 4 of the Sale of Goods Act and 4 of the Statute of Frauds repealed? Because they produced injustice despite the fact that they were among the most famous sections in the whole Statute Book. Why has the Rule against Perpetuities been referred to the Law Reform Committee? [3] Again the law is perfectly well known and exceptionally precise in its operation, yet it produces frequent injustice. Why was the Law Reform (Frustrated Contracts) Act, 1943, required? Again, because injustice frequently resulted in practice. In all these and many other cases injustices would never have occurred if the parties had always had a skilful solicitor at their elbows. But the fact that the difficulties of the law can be avoided by exceptionally skilful drafting is surely no argument for leaving the law as it is. The fact of the matter is, as the Committee admitted, that people do make home-drawn wills, that they do make mistakes, and even solicitors do so more often than could be desired. Where these mistakes are largely due to a

[3] And why was s. 163 of the L.P.A., 1925, necessary?

rigidly technical rule such as that under discussion the proper function of legislation is surely to simplify the law so as to avoid the existing difficulties or at least (in the case of wills, anyhow) to give the courts power to rectify the mistake.

It is worthy of notice that the pre-war Law Revision Committee do not seem to have shared the Nathan Committee's apparent views on legislative policy. In their Sixth Interim Report on the doctrine of Consideration the Committee made several recommendations for reform of the doctrine in cases where they agreed that no injustice would be caused if the parties were always well advised by skilful solicitors. Thus in paragraph 24, in considering the case of a person who may have spent time and trouble in reliance on a promise to keep an offer open for a definite time, the Report says: " It is small consolation to him to be told that he ought to know the law. His retort would probably be that the law should be altered." Again, in paragraph 40 the Report answers Lord Brougham's remarks in *Jorden* v. *Money* (1859) 5 H.L.C. 185 that there is no reason for the application of the doctrine of estoppel where the statement made is one of intention " because the parties have only to enter into a contract, and then all difficulty is removed," by pointing out that " Unfortunately people are not always so far sighted; if they were, there would be little need for law or lawyers." It is submitted that the Law Revision Committee showed a greater appreciation of the policy which should underlie legislative law reform.

The Committee's second reason for not recommending that the Act should apply to future dispositions is no more convincing than the first. *Ex hypothesi* we are considering cases where the testator is unaware of the existing law, and it would therefore seem improbable that he would be aware of any power in the court to invalidate part but not all of a disposition. In any event most testators would surely prefer that their property should be applied for charitable purposes consistently with the terms of the will than that the entire disposition should be invalidated with the result that the next-of-kin receive an unmerited windfall.

It is finally submitted that it is utterly indefensible to legislate retrospectively as this Statute does without regard to future dispositions and it is much to be hoped that this Act will not become a model for future legislation.

P. S. Atiyah.

REPORTS OF COMMITTEES

Proposed Reform of the Ecclesiastical Courts

Many lawyers would appear to be of the opinion that the church courts ceased to function altogether when their jurisdiction in testamentary and matrimonial matters was transferred to the statutory tribunals created under the Court of Probate Act and Matrimonial Causes Act of 1857. That this was not the case was shown in *R.* v. *Chancellor of St. Edmundsbury and Ipswich Diocese* ([1948] 1 K.B. 195), in which the Court of Appeal reminded us that the law which they apply, while distinct in history and substance from the system administered by the temporal courts, is none the less " the King's ecclesiastical law " (*per* Wrottesley L.J. at p. 221). The report of the recent Commission on the Ecclesiastical Courts, under the chairmanship of Lloyd-Jacob J., set up in 1951 by the Archbishops at the request of the Convocations, contains a valuable survey of the history of these courts, as well as important recommendations for their reform. (S.P.C.K., 15s. 6d.)

The traditional system of church courts consists of a hierarchy commencing with the Archdeacon's Court, which is in practice obsolete except for visitations. The Commission do not propose to change this situation. Above this comes the Consistory Court of the Diocese, staffed by the Chancellor, now normally but not necessarily a barrister. The Commission suggest that this should be made obligatory, even in the case of a clerk in holy orders, adding an additional requirement of seven years' practice—a provision almost certain to exclude the possibility of such a clerk's being appointed, for even those few clergy who had been called to the Bar before ordination as a rule lack any such length of practical experience. Further—and here their recommendation runs counter to that of several earlier commissions—they believe that it should not be permissible for the Bishop himself to preside over the court instead of—or even with—his *alter ego*, the Chancellor. There is an interesting parallel here with the inability of the Sovereign to preside in her own courts, as established in the celebrated *Prohibitions del Roy* ((1607) 12 Rep. 63). Above this comes the court of the province, picturesquely called the Court of Arches in the case of the province of Canterbury, the Court of Chancery in that of York. Under the Public Worship Regulation Act, 1874, the same person must be appointed judge of both provincial courts, in order to secure uniformity of decision within the established Church: a rule wisely retained by the Commission. Above that there is the possibility of an appeal to the Judicial Committee of the Privy Council. This " final court of appeal "

was expressly reserved from the terms of reference of the Commission, but none the less their recommendations, if adopted, would remove all, or almost all, ecclesiastical business from that body.

Side by side with this traditional hierarchy of courts there also exists a large number of statutory tribunals created by Acts ranging from the Church Discipline Act, 1840, to the Bishops (Retirement) Measure, 1951, each statute establishing fresh courts and a special procedure, so that every ecclesiastical case may be required to be dealt with by a distinct process before a theoretically distinct court, although in fact most of these statutory courts are based on an implementation of the traditional courts by additional clerical or lay assessors in varying proportions. The whole forms what can only be described as, in the Commission's own words, "a jungle of courts." It has been the task of the Commission to try to establish order out of this chaos. They have approached their task with great care, examining fully the history of the courts and the reports of the many commissions for their reform or reorganisation which have considered the question (sometimes with, sometimes without, statutory consequences) since 1832. They have heard many distinguished witnesses, including four bishops, Vaisey J., and experienced ecclesiastical judges.

Their recommendations are based on a distinction between what they call "Conduct Cases," *i.e.*, those concerned with moral lapses or other factual misconduct such as neglect of duty, by the clergy, whether beneficed or not, and what they call "Reserved Cases," where the question in issue involves doctrinal or ritual deviation from the teaching of the Church. They recommend that for the former the only court at the diocesan level should be the traditional Consistory Court, strengthened by additional judges selected in a uniform manner. Appeal from its decision is to be to the Provincial Court, again suitably strengthened, but without the possibility of any further appeal (*i.e.*, to the Privy Council). Conduct cases relating to bishops (which one would hope will always be exceedingly rare) are to be dealt with in the special manner established by the Measure of 1951 already mentioned. The special court set up under the Benefices Act, 1898, which deals with cases in which the rights of a lay patron may be concerned, is also to be retained.

"Reserved Cases" have always appeared to be a source of difficulty, not least when taken in the last resort before the Privy Council—a court not of Church lay members (which might be defensible) but of them and others, including in theory atheists, Hindus, Jews, Roman Catholics and so on. It is notorious that some Privy Council rulings, allegedly making binding law for the Church, are regularly broken by ninety-nine per cent. of the clergy, including its highest dignitaries, *e.g.*, even a procession into church of the choir is "illegal." [1] Such a situation can only bring the

[1] *Elphinstone* v. *Purchas* (1870) L.R. 3 A. & E. 66.

Queen's ecclesiastical law into grave disrepute, and has undoubtedly led to a general relaxation of discipline in such matters which can bring nothing but harm to the Church. Boldly flouting its Terms of Reference, the Commission suggest a procedure whereby such cases should never again come before the Judicial Committee, or even any of the traditional hierarchy of courts. Instead they would go in the first instance before a Court of Inquiry appointed by the Convocation composed of one bishop, two clergymen (preferably theologians) and two chancellors. As its title suggests, this body is not a court of trial, but is to have a function comparable with that of the magistrate's preliminary inquiry in criminal cases. If it decides to proceed, the actual trial would come before the Court of Ecclesiastical Causes Reserved. This is to be composed of the Archbishop as chairman, two other bishops and two lay communicant members of the Church who hold or have held high judicial office. The decision of this court would be final.

This report must be considered a very valuable document. It is to be hoped that no time will be lost in putting its recommendations into practice, with or without modifications. The state of the Queen's ecclesiastical courts is clearly one which must by no means be left as it is.

C. d'Olivier Farran.

NOTES OF CASES

Administrative Discretion and the Courts—the Better Part of Valour?

In *Prescott* v. *Birmingham Corporation* [1954] 3 W.L.R. 600, 990 the facts were these. The defendant corporation resolved to approve and adopt a scheme to provide free travel facilities on the corporation's omnibuses on every day (except Saturday) between 10 a.m. and 4 p.m. for old people resident in the city who were already receiving retirement or old age pensions or national assistance payments. The loss of income was estimated at about £90,000 which was to be met from the rate fund. The power of the corporation to run omnibuses was given by private Acts. The permission of the licensing authority had been obtained. The plaintiff, a ratepayer, sought a declaration that the scheme was illegal and *ultra vires*. In the court of first instance, Vaisey J. gave judgment for the plaintiff. He was upheld by the Court of Appeal.

The basis of the decision of Vaisey J. was that the corporation was attempting to usurp the functions of the legislature and to redress a nation-wide grievance by local administrative methods. "The subsidising of particular classes of society," said the learned judge, "is . . . a matter for Parliament, and for Parliament alone." As a statement of political, social or economic opinion this is clearly defensible. But it would seem to follow from another proposition: that taxation ought to be a matter for the central government alone. This again is defensible and the abolition of local rates has been frequently advocated as a radical solution for the anomalies of local taxation. The present position is, however, that directly or indirectly some fifteen hundred local authorities (excluding parishes and special bodies like river boards) demand precepts or levy rates. The amounts demanded by rating authorities vary from about 14s. to 30s. in each pound of rateable value. Rateable values themselves differ considerably throughout the country. The services provided are similarly unequal in quality and extent. If there exists this large and varied system of local taxation with innumerable concealed subsidies to different groups according to geographic and party disposition, then it can equally be argued, as a matter of political, social or economic opinion, that the local, no less than the central, taxing authority is entitled to give relief to certain groups at the inevitable expense of others. What is not clear is how far a court should declare a particular operation valid or invalid by reason of one or other of these arguments.

If Birmingham Corporation acted illegally, it must be because

the borough had, in law, exceeded its limited powers. The question is one of legal validity, of the differences between statutory and common law corporations, of *vires* and of the proper exercise of discretion. The principle has generally been accepted that a borough is not limited, as is an authority created by statute, to its statutory powers, but may act as a natural person; that the Municipal Corporation Acts of the nineteenth century restricted this principle by requiring statutory authority for the spending of money out of the rate fund; and that there is doubt (*Att.-Gen.* v. *Leicester Corporation* [1943] Ch. 86) how far this restriction has been affected by the Local Government Act, 1933. It was thought that the Court of Appeal might consider the decision along these lines.

But the Court of Appeal upheld the decision on new and different grounds. The single judgment of the court was read by Jenkins L.J. and may be summarised thus. The defendant corporation are authorised by statute to maintain and operate their transport undertaking and " to charge such fares to passengers travelling on their vehicles as the defendants think fit " subject to any prescribed statutory maxima and to any conditions fixed by the licensing authority. The interest of the licensing authority is to see that the fares are reasonable, and for this reason the authority required the corporation to pay £90,000 to the transport undertaking out of the rate fund in the first year and not to meet the cost of the scheme by an increase in fares. The Court of Appeal accepted that discriminatory charges might be valid. But they said that if a trustee running an omnibus service chose, from motives of philanthropy, to allow some person or class of persons to travel free or at reduced fares, although those charged the full fare might not be able to object, *cestuis que trustent* certainly could. Then follows the core of the judgment. " Local authorities are not, of course, trustees for their ratepayers, but they do, we think, owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter." Thus local authorities are not, " purely on the strength of a general power," entitled to charge different fares to different passengers " simply because the local authority concerned are of opinion that the favoured class of persons ought on benevolent or philanthropic grounds to be accorded that benefit." This is illegal because " it would amount simply to the making of a gift or present in money's worth to a particular section of the local community at the expense of the general body of ratepayers." The corporation were required to run the undertaking as a business venture and, although they had to aim at providing an efficient service at reasonable cost (which might involve some degree of loss), they should not go out of their way to make losses by giving away rights of free travel. Concessions in favour of children were readily justifiable on business principles. Those to blind and disabled persons " may perhaps be classed as a minor act of elementary charity to which no reasonable

ratepayer would be likely to object." Finally, "if the case is to be regarded as turning upon the question whether the decision to adopt the scheme was a proper exercise of a discretion conferred on the defendants with respect to the differential treatment of passengers in the matter of fares, the answer, in our opinion, must be that it was not a proper exercise of such discretion. We think some support for this view is to be derived from the speeches in the House of Lords in *Roberts* v. *Hopwood*." So ran the judgment of the Court of Appeal.

In essence, this is a simple case. Its central problem is familiar. How far will the courts go in limiting a discretion which is absolute on its face? Here the corporation of Birmingham was empowered by statute to fix such fares as it thought fit. So in *Roberts* v. *Hopwood* [1925] A.C. 578, Poplar Borough Council were entitled to fix such wages as they thought fit. So in *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 K.B. 223, the defendants were entitled to attach to a licence such conditions as they thought fit. In the case of transport, no doubt because it was likely to be a monopoly trading undertaking, Parliament had in the past thought fit to lay down certain general restrictions. Thus statutory maxima might be prescribed and a special statutory body —the licensing authority—was established to ensure that fares were reasonable. In this case, the Court of Appeal has shown that, despite the unpopularity of *Roberts* v. *Hopwood* (shown in the treatment of that case in *Re a decision of Walker* [1944] K.B. 644, and the *Wednesbury Corporation* case) and despite the restrictions which statutes had placed on the exercise of the discretion, the courts are prepared to control that exercise further by invoking the concept of the trust as an analogy.

Counsel for the defendant corporation argued that the court should not override a decision reached in the exercise of such a discretion unless satisfied (apart from bad faith, which was not suggested) that the corporation had failed to take into account relevant matters or had taken into account irrelevant matters or had acted so unreasonably that there was no real exercise of the discretion at all. Granted that the corporation had power to discriminate (which the Court of Appeal accepted), this interpretation of the court's functions seems to be soundly based on the *Wednesbury* case. But the Court of Appeal rejected this argument, took to themselves far greater powers and, as the last part of judgment shows, were prepared to go yet further. For apart from the principle of a breach of trust, the court was prepared to say that this was an improper exercise of discretion on a basis similar to that of the House of Lords in *Roberts* v. *Hopwood*. I have quoted the passage in the judgment which refuted any decision made "on benevolent or philanthropic grounds." There are passages in *Roberts* v. *Hopwood*, particularly in the judgment of Lord Atkinson, which seem to be the source of this view. Lord Atkinson

speaks of the authority there allowing themselves "to be guided . . . by some eccentric principles of socialistic philanthropy"; and again: "The indulgence of philanthropic enthusiasm at the expense of persons other than the philanthropists is an entirely different thing from the indulgence of it at the expense of the philanthropists themselves." So also, it may be that Lord Atkinson's judgment suggested the main ground of the decision. For he said: "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others."

In the *Wednesbury Corporation* case, Lord Greene M.R. was at pains to point out that once it was established that relevant matters had been considered and irrelevant matters disregarded, that the subject-matter dealt with was within the competence of the local authority and that the authority had not acted in a grossly unreasonable way, then the effect of the legislation was not to set up the courts as an arbiter of the correctness of one view over another. It was for the authority to make its decision. As Lord Russell said in *Kruse* v. *Johnson* [1898] 2 Q.B. 91, when speaking of the reasonableness of a local by-law, "representatives may be trusted to understand their own requirements better than judges." The Court of Appeal in this present case, like the House of Lords in *Roberts* v. *Hopwood* is saying simply: "We do not think you are spending public money properly. We think you should not make these particular concessions. We think that although, in the interests of an efficient service at reasonable prices, it may be necessary for you to run at a loss, you should not incur a loss in this particular way."

The attitude of the courts to the discretionary powers of public authorities (both locally elected councils and Ministers responsible to Parliament) is clearly entering a new (politely) formative or (less politely) arbitrary period. The courts are beginning to react more strongly. The recent development of certiorari and of the action for a declaration is an illustration of this. But although (perhaps, because) the attitude of the courts is strengthening, it is becoming more and more unpredictable. The discretionary nature of the two remedies just mentioned is being more and more stressed. And the vagueness of a duty analogous to a trust is self-evident. On the one hand, the Pilate-like hand-washing by the courts when faced with a decision of a Minister acting under an "if he is satisfied" power amounts almost to a refusal to accept a responsibility which hitherto it was thought the Constitution had imposed on the judges as part of their function. On the other hand, this *Prescott* case

shows how free of the impediment of precedent and emerging principle the intervention of the courts can be. It is becoming most necessary that the attitude of the courts should quickly crystallise so that both government and governed can foresee the likely legal consequences of a particular administrative action. If the rights of the individual are being infringed by what is called administrative lawlessness, then the extent to which those rights are to be preserved by the courts should be more clearly defined lest we find ourselves faced with a degree of judicial lawlessness as well. Too much discretion in the courts is as unsatisfactory as too much discretion in the Administration.

J. A. G. Griffith.

Scope of Review of Determinations by Statutory Tribunals

Although the decision of the Court of Appeal in *Healey* v. *Minister of Health* [1954] 3 W.L.R. 815 (affirming the decision of Cassels J. in the court of first instance [1954] 2 Q.B. 221) lays down no new principle of law, it is a good illustration of the distinction between the supervisory and appellate jurisdiction of the courts. It also raises important questions regarding the scope of the action for a declaration as a means of impugning the decisions of statutory tribunals.

By section 67 (1) of the National Health Service Act, 1946, the Minister of Health is empowered to make regulations which may provide for the conferment of superannuation benefits on prescribed officers and for the determination of all questions arising under the regulations by the Minister. Regulations have been made dealing with the superannuation rights of (*inter alios*) a mental health officer, who is defined as a member of a hospital staff devoting the whole or substantially the whole of his time to the treatment or care of mental patients. Any question arising under the regulations "as to the rights or liabilities of a retired officer of an employing authority, or of a person claiming to be treated as such . . . shall be determined by the Minister." The plaintiff, who was employed as assistant to the chargehand in the shoemaker's shop of a mental hospital, applied to be designated as a mental health officer for the purposes of superannuation. The Minister rejected his claim on the ground that he did not devote substantially the whole of his time to the treatment or care of mental patients. The plaintiff then brought an action against the Minister, claiming a declaration that he was a mental health officer within the regulations, inasmuch as patients engaged in occupational therapy were in his care for a substantial part of his working time. In his defence the Minister raised a plea in bar, contending that the court had no jurisdiction to reopen his decision.

In both courts judgment was given for the Minister on the preliminary issue raised by his plea in bar. The plaintiff had not pleaded that the Minister's determination was invalid or wrong in law (though in substance he was claiming that it was wrong in law or fact or both); what he sought was a new determination by the courts of a matter committed to the Minister for determination. It was not for the courts to usurp an appellate jurisdiction which had not been created by statute. If, moreover, a court were to assume jurisdiction and grant the declaration sought by the plaintiff there would be two determinations, inconsistent with each other, which would stand side by side unless the Minister chose to revoke his determination.

What would the plaintiff have had to establish in order to succeed, had he pleaded that the Minister's determination was invalid or erroneous in law? It is settled law that where it is provided by legislation that a question shall be determined by a Minister or by arbitration, the decision may be challenged in the courts, after the process of determination has been completed, by certiorari, an action for a declaration or any other appropriate procedure on the ground that it was made in excess of or without jurisdiction. Further, if the competent authority has failed to observe the rules of natural justice certiorari will lie to quash its decision; and if the party aggrieved elects instead to bring an action for a declaration, a court will probably make a declaration that the decision was invalid. But if the authority has erred on a matter that is not collateral or preliminary to the issue that it has to determine but is part of that very issue, certiorari will not lie to quash its decision (see *R.* v. *St. Olave's Board of Works* (1857) 8 E. & B. 533; *R.* v. *Minister of Health* [1939] 1 K.B. 232; *R.* v. *Minister of Health* [1942] 1 All E.R. 81, 551) unless the error is an error of law and is apparent on the face of a written determination made by the authority (*R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338). Whether an action for a declaration would be an appropriate alternative method of impugning an order for patent error of law is not clear. In *Healey's* case Denning L.J. said, *obiter* (at 819), that it would be appropriate; Morris and Parker L.JJ. did not deal with the point. It could hardly be pleaded that an erroneous decision was a nullity if the tribunal had jurisdiction to make it; the plaintiff would therefore have to ask the court to declare that it was erroneous in law. But if the court were to grant such a declaration the practical difficulty (adverted to in *Healey's* case) of having two inconsistent determinations standing side by side might remain. If the error that the tribunal was alleged to have made neither went to jurisdiction nor was contained in a speaking order, so that certiorari would not lie, it is improbable that a court would ever make an order conflicting with the decision in an action for a declaration, save in highly exceptional circumstances. Those

circumstances were not present in *Healey's* case, and dicta indicate that the Court of Appeal would almost certainly have declined jurisdiction even if the plaintiff had expressly pleaded that the Minister had erred in law. It is possible to regard *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18 as an exceptional case where the courts granted a declaration overruling the decision of a tribunal which had erred in law within its jurisdiction; it is also possible to regard it as a case of a tribunal acting without jurisdiction; the latter view of the case may well be the better one.[1]

The general tenor of the judgments in *Healey's* case supports the view that the scope of review of decisions of statutory tribunals is not substantially wider in an action for a declaration than on an application for certiorari. It is true that Denning L.J. suggested (at 818) that if the Minister had been shown in that case to have made a palpable error, the court would have held his determination to be invalid on the ground that there would be good reason to think he had " mistaken or misused his powers "; but courts faced with similar situations in other forms of proceedings have found no difficulty in treating such mistakes as going to jurisdiction: see *Murphy* v. *R.* [1911] A.C. 401; *Estates & Singapore Trust Agency, Ltd.* v. *Singapore Improvement Trust* [1937] A.C. 898; *R.* v. *Connell* (1944) 69 C.L.R. 407; *R.* v. *Australian Stevedoring Industry Board* (1953) 88 C.L.R. 100; or as constituting a failure to hear and determine according to law: *R.* v. *Cotham* [1898] 1 Q.B. 802.

S. A. de Smith.

Administrative Tribunals

The case of *Woollett* v. *Minister of Agriculture* [1954] 1 W.L.R. 1149; [1955] 1 Q.B. 103, is not of itself of any great importance. The points of law were technicalities of the kind that do not enhance the reputation of lawyers and the interest comes from the reactions that the case has produced. An Agricultural Land Tribunal heard a case in September, 1951, and confirmed the proposal of the Minister that some land should be acquired under section 85 of the Agriculture Act, 1947. There was considerable delay in taking further steps for acquiring the land and a notice to treat was served in October, 1953. The case came before the Queen's Bench Division in July, 1954, so that it is not surprising that there was some dispute over exactly what had happened at the hearing in 1951. An Agricultural Land Tribunal is not a body in constant session nor, in fact, in constant being; its chairman is a lawyer appointed by the Lord Chancellor and the other two members are representative and, in effect, must be drawn,

[1] Contrast the views on this and other points expressed by Mr. Gordon Borrie in his article at p. 138, *ante*.

one from a panel of persons nominated by the National Farmers' Union, and the other from persons nominated by the Central Land Owners Association. The 1947 Act says that these two members "shall, for each reference to the tribunal, be appointed by the Minister." At the beginning of the hearing in 1951 it was mentioned that the chairman was appointed by the Lord Chancellor, and a Rev. Mr. Marsh got up and asked who appointed the other two members. He expected to be told that they were appointed by the Minister. As this was an appeal from a proposal by the Minister, Mr. Marsh's purpose was to discredit the tribunal. The chairman made the reply that it was he who had "selected" or "chosen" or "appointed" the nominated members. There was a dispute about the actual words used. What had actually happened was that the secretary to the tribunal, Mr. Comins, who was also an official of the Ministry of Agriculture, had followed the usual procedure of considering which nominated members should be asked to sit and had mentioned this to the chairman. With the chairman's approval he had telephoned the two members and ascertained that they would be available. He had then written to them confirming the arrangement and had signed the letter as secretary of the tribunal.

The plaintiff maintained that the two members had not been appointed by the Minister. Stable J. accepted this view: "All that happened was that Comins rang up the members, found out if it was convenient for them to sit, and then confirmed the date and so on in the letters that he wrote. But in so doing, Comins was not expressing himself to be authorised by the Minister; he did not purport to be acting on behalf of the Minister; he did not think that he was acting on behalf of the Minister and in point of fact he was not. He was functioning as the secretary of the tribunal and nothing else." On that view there never was a tribunal and therefore further provisions of the Act could not cure any defects and the action must succeed. The Court of Appeal reversed that decision. Morris L.J. considered that Comins, being a Ministry official detailed to do the work in connection with the tribunal, was authorised by the Minister though he erroneously appointed two members in his capacity of secretary to the tribunal and not as agent for the Minister. Jenkins L.J. also thought that the two members had been appointed within the meaning of the Act. Both these Lords Justices and Denning L.J. were clear that if there was any defect in the appointment it was cured by the provision that "All acts done at any meeting of any such body shall, notwithstanding that it is afterwards discovered that there was a defect in the appointment . . . of a person purporting to be a member thereof, be as valid as if that defect had not existed." Hence the tribunal certainly was a tribunal. It followed from that that the rest of the Act, which attracts provisions of the Acquisition of Land (Authorisation Procedure) Act, 1946, would apply and

the time limit of six weeks for challenging the order in the High Court had expired.

A common lawyer of a completely traditional outlook will doubtless feel aggrieved that when a possible defect is discovered it no longer follows that a decision will be upset. The provision about curing defects is, however, not peculiar to the Agriculture Act; such provisions occur in other places, for both administrative and judicial proceedings, including Local Government Act, 1933, s. 60, Justices of the Peace Act, 1949, s. 5, and in the practice of the Court of Criminal Appeal. It is obviously desirable that all provisions for the appointment of members of tribunals should be carefully observed. It is also desirable that decisions should not be upset on technicalities that have no merits. There was no suggestion that Comins acted unfairly or that the plaintiff had been prejudiced before the tribunal because of the method of appointing members. Denning L.J. pointed out that Comins was acting much as a Clerk to Justices does. In the words of Jenkins L.J.:

> "Appointment was limited to a panel of busy men serving without remuneration (as distinct from expenses) and under no obligation to sit unless they chose. The problem was to find eligible persons who were prepared to sit on any given reference, and from a practical point of view Comins' method of finding nominated members was the natural one to adopt. It was argued that the appointment of a person to sit as a member of a judicial tribunal such as this was a solemn act requiring due formality in its performance. This, I think, overlooks the fact that the choice of nominated members was limited to a panel so picked as to secure that the persons named in it were representative of the interests of farmers and of owners of agricultural land, and further limited by the provision which required that one from each of these two categories should be appointed for every reference. The task of appointment thus really resolved itself into finding two eligible persons who would be available to sit on a given day."

Now when we look at some comment that this case has produced it is really astonishing. Let us consider Professor Hamson's *Executive Discretion and Judicial Control*. On page 146 we learn that "The Conseil d'Etat has very firmly set itself against the type of tribunal which is attached to and a satellite of a Ministry. To the Conseil d'Etat such a tribunal does not present sufficient guarantee of a real judicial independence." To that there is a footnote about *Woollett*. Agricultural Land Tribunals (and other special tribunals) are, of course, established by Parliament and not by Ministers, and it is most useful to learn that, if we were to follow the French pattern, we should have an administrative court setting itself very firmly against the provisions of Acts of Parliament. However, the point of interest here is that anyone should think that an Agricultural Land Tribunal is "attached to and a

satellite of a Ministry." It is an example of a tribunal completely independent of the Minister. It is true that under the 1947 Act the two members were to be "appointed" by the Minister for each reference, but they could only be appointed from persons nominated by bodies over which the Minister has not the slightest control. Amending legislation of 1954 provides that the Lord Chancellor makes up the panels from persons nominated, and that the appointment of two members for each reference is to be made by the chairman of the tribunal. That is a change that is to be welcomed because it may stop Mr. Marsh, Professor Hamson and others from misdirecting themselves. The Lord Chancellor will have to make up his panels from persons nominated by the same organisations, and, as far as anyone can see, exactly the same people will be selected. The trouble with people who will go about suggesting that tribunals are attached to and so presumably under the control of a Ministry is that they cannot bother to see what sort of people are appointed. To think that organisations of land owners or farmers, Trade Unions and other bodies put forward people to be stooges of a Minister simply displays a lack of understanding of English public life. Professor Hamson has, however, another reference to this case, on page 10 of his book, where we gather that the High Court was able to prevent a "substantial miscarriage of justice." A miscarriage of justice is a phrase used in our courts to signify that something has gone seriously wrong, such as a man being convicted when the conviction cannot be supported. A "substantial" miscarriage of justice must be pretty bad; here, Denning L.J. (who thought that Comins had not acted on behalf of the Minister) said:

> "It is not as if the wrong men were appointed to sit. The right men were appointed, but mistakes were made in the method of their appointment. That was a defect, but no more than a defect, and it was cured by the terms of the Act. . . . I cannot help remarking that it would be most unfortunate if we came to any other conclusion."

Then what are we to make of suggestions that something dreadfully wrong occurred?

R. M. Jackson.

Safe System of Work

After the decision of the House of Lords in *General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180, it might have been thought that no more would be heard for some time of cases concerning window-cleaners who sustained injuries in the course of their precarious duties, or at any rate that no further doubts could remain concerning the legal position. The House had there considered an accident caused by a creeping sash window which resulted in a man who was standing on the sill cleaning the window

from the outside losing his balance and falling. They held the employers liable in damages because they failed to examine the window and see what dangers were involved in cleaning it by "the window-sill method." Their Lordships thought the employers should have provided the worker with wedges or blocks to use wherever the window was liable to slip or run down, and that they were negligent in failing to do so. As was pointed out in my note on this case (16 M.L.R. 382, July 1953) this result was reached by the House without subscribing to the rather wider view of an employer's duties which was enunciated by Denning L.J. in the Court of Appeal, to the effect that it was the duty of the employer to devise a reasonably safe method of cleaning the windows in question, and that "the window-sill method" was unsafe: [1952] 1 K.B. 141, noted in 15 M.L.R. 243, April 1952.

Now we have yet another window-cleaner case, which reopens the whole question of the choice of methods and the duties of an employer in relation thereto. This is the case of *Drummond* v. *British Building Cleaners, Ltd.* [1954] 1 W.L.R. 1434, C.A., in which the facts were that the plaintiff, an experienced and efficient window-cleaner employed by the defendants, was cleaning the outside of a first-floor sash window by standing on a sloping sill outside the window and holding on with one hand by a finger grip under the bottom of the top sash when his foot slipped, his fingerhold was wrenched away, and he fell to the ground, receiving serious injuries. The window and sill were of sound construction and in good condition. Above the top sash was a transom and above that a fanlight. Although the plaintiff had a safety belt none of the windows in the building had eye-bolts or hooks to which it could be attached. The plaintiff was not instructed to hitch the rope attached to his safety belt round the transom above the window nor to use a ladder provided by the defendants. In fact, as in the *Christmas* case, the defendants alleged that there was contributory negligence on the part of the plaintiff in failing to use this transom as an anchor for his rope, and once again it proved to be a legal argument in the nature of a boomerang, for the argument was turned against the defendants, who, as Denning L.J. remarked, were hoist with their own petard. Whether a more appropriate expression could be devised to cover window-cleaning firms is a matter for speculation. (Hanged with their own safety belt might be considered suitable.)

On these facts Pilcher J. in a reserved judgment at [1954] 1 W.L.R. 501 gave judgment for the defendants. The learned judge was obviously greatly impressed by the volume of evidence called before him concerning the conditions which were encountered by firms engaged in window-cleaning operations in the ordinary course of their business. His judgment contains a fairly full account of this general evidence, which he described as "probably fuller than that called in the *Christmas* case" (p. 506). He thought that there

was nothing to suggest that " in causing or permitting the plaintiff to clean this particular window from the sill the defendants were in breach of their common law duty to provide a safe system of work," and the evidence was that the method adopted by the plaintiff was the one by which upper-storey sash windows were almost invariably cleaned and was the normal and general method in the trade, and that it was commercially impracticable for window-cleaning firms to adopt any other method, such as insisting upon having eye-bolts inserted to the walls, for the purpose of attaching safety belts thereto, or insisting upon the use of cradles. The defendants had acted as reasonable and prudent employers and had not been guilty of any lack of care for the safety of the plaintiff.

The Court of Appeal, consisting of Denning, Morris and Parker L.JJ., saw the case in a rather different light, and took the opportunity to develop a stage further their views concerning the employer's duties in cases of this kind. They held unanimously that the cleaning of windows by " the window-sill method " has been proved to be dangerous, and that therefore it is incumbent on employers to do all they can to reduce the risk and to insist on the workmen taking precautions for their own safety. The evidence in this case established that the transom method was a reasonably practical way of securing safety, and the employers were guilty of negligence in failing to inquire into the possibility of attaching the safety belt to a transom, or to instruct their workmen to use that method when it was available.

The way Denning L.J. put it, at p. 1436, was thus: " It is clearly shown by the evidence in this case, and in other cases which have come before the court, that the practice of cleaning windows by standing on the sill is dangerous. In those circumstances the employers are under a duty to do all they can to reduce the risk. . . The employers should always be on the look-out to see if there is any more that can be done for the safety of the men." And in a later passage, at p. 1437, he says: " It is quite clear . . . that the transom method was a practicable way of securing safety subject only to the possible objection of the occupier . . . They (the employers) ought to have asked the occupier whether he minded or not."

Morris L.J. explained the position in similar terms at p. 1439. The window-sill method, he said, was " fraught with considerable peril, and, therefore, it was the duty of the employers to apply their minds constantly to the question of doing all that reasonably could be done to minimise the dangers and the perils . . . If the employers could have laid down some system, even though referable to some only of the windows that the plaintiff would be called on to clean, which would have obviated dangers or lessened the risks, then it was the duty of the employers to do their best reasonably to adopt and prescribe such a system."

Parker L.J. expressed his complete agreement with what had been said concerning the duty of window-cleaning employers to exercise vigilance for the safety of their employees, but he was careful to observe the limits of the decision. "A window-cleaning employer," he said, at p. 1443, "cannot, for example, be expected to lay out the job window by window, whereas the employee at all times must take reasonable care for his own safety." In his view Pilcher J. had taken "too broad a view in treating the defendants' duty in relation to windows generally rather than in relation to the windows of the job on hand . . ." (p. 1444).

Whether as a result of this decision window-cleaning firms will know more clearly where their duty lies is debatable, but it does seem that the Court of Appeal have given certain positive guidance in the matter of devising a safe system of work. Such firms must now consider each job which is undertaken individually and prescribe the methods which the men are to adopt in dealing with the different kinds of window. They need not specify the method in relation to each particular window. They must warn the men of the danger of "creeping sashes," and supply blocks or wedges for use in dealing with them. If there are eye-bolts or hooks, the men must be told to attach their safety belts to these. If there are transoms or other means of securing safety belts, these must be used. They must exercise continual vigilance for the safety of the men.

This then is the position established as a result of these "window-cleaner" cases. Even now much remains vague and undecided, and we cannot rule out the possibility of further litigation, though the Court of Appeal refused leave to appeal to the House of Lords in the present case. Morris L.J. expressed the hope that "in time some additional safety suggestions other than those referred to in the evidence in this case may be considered" (p. 1442), and Pilcher J. referred to the fact that a number of associated window-cleaning companies had recently considered what additional precautions could be taken to safeguard their men (*loc. cit.* p. 505). There remains the question whether it is to be left to the courts to lay down *ex post facto* as a result of litigation on particular facts what "additional precautions" a reasonable and prudent employer should take. The alternatives would seem to be either that the trade should itself agree upon a code of reasonable practice in this matter, or, as was suggested in my previous note, the question should engage the attention of the authorities who decide what regulations shall be made in relation to different kinds of employment. If a building worker is protected by regulations, why not a window-cleaner? It is no answer to refer to the limitations contained in the Factories Act, 1937. If this Act stands in the way, it should be amended. That is, unless we are content to witness a tedious succession of cases in which the courts endeavour

to legislate for the trade, and it can hardly be suggested that they are the best source of such employment law.

J. E. Hall Williams.

Exemption Clauses and Third Parties

Two recent cases raise the question whether a person who is not a party to a contract can be affected by an exemption clause contained in it. This question falls into two parts: (i) can the third party claim the benefit of the exemption clause? (ii) can the third party be bound by the exemption clause? The doctrine of privity of contract demands that the third party should neither be entitled to the benefit nor subjected to the burden of the clause, unless one of the recognised exceptions to that doctrine (such as agency) can be invoked in his favour or against him. That this is in fact the law is born out by *Adler* v. *Dickson* [1954] 3 W.L.R. 696, and *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402.

(1) *The benefit of the exemption clause.* In *Adler* v. *Dickson* the plaintiff entered into a contract of carriage with the P. & O. Steam Navigation Company. The conditions of transport which were printed on her ticket, so far as here material, provided: "The company . . . shall be exempt from all liability in respect of any . . . injury . . . to the person of any passenger . . . occasioned by the negligence of the company's servants . . . while the passenger is embarking or disembarking." The plaintiff was injured while reboarding the ship at Trieste. Since she was by the terms of her ticket admittedly precluded from suing the company, she brought an action against the master and boatswain of the ship, alleging that her injuries were due to their negligence. The defendants, as a preliminary point of law, raised the defence that they were entitled to the benefit of the exemption clause. The Court of Appeal rejected this contention, but the reasons given in the various judgments are not identical.

In order to appreciate this conflict of judicial opinion it is necessary to go briefly into the history of this topic. Questions of this sort first arose in the nineteenth century, prior to the age of railway amalgamations, when an owner of a consignment of goods or a passenger would frequently have to use the services of several railway companies, but would usually be in direct contractual relationship with only one. If his contract with that company contained an exemption clause, could a second or subsequent company take the benefit of that clause?

At first it was thought that the plaintiff was in a dilemma: companies other than the first were "either not liable at all, as no agreement was entered into with them, or . . . if the contract in any way attaches to them, the exception exonerates them from

liability" (*Bristol & Exeter Ry.* v. *Collins* (1859) 7 H.L.C. 194, 233). The effect of subsequent decisions, was to make the dilemma a false one, since its first horn ceased to exist. In a number of late nineteenth century cases railway companies were held liable in tort even though there was no contract between them and the plaintiffs.[1] Thus in the question put above the second railway company was prima facie liable. But it could escape liability under the exemption clause if an agency relationship could be spelt out, as in *Hall* v. *N. E. Ry.* (1875) L.R. 10 Q.B. 437 and *Barratt* v. *G. N. Ry.* (1904) 20 T.L.R. 175. The subtlety of this device is brought out by an analysis of the judgments in the former case. Blackburn J. thought that the first railway company was the agent of the plaintiff to contract with the second company (at p. 442); Lush J., that the first company was the agent of the second to contract with the plaintiff (at p. 443).

So far the law is easy enough to state, if not to apply. Difficulty arises, however, from the decision of the House of Lords in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* [1924] A.C. 522. In that case the plaintiffs contracted with the first three defendants, the charterers, for the carriage of a cargo of palm oil from West Africa to Hull. The charterers, who generally used their own ships for such purposes, on the present occasion chartered a ship from the fourth defendants, the shipowners. However, they used their usual form of bill of lading, which protected "the shipowners, hereinafter called the company"[2] from liability for bad stowage. It was held that the shipowners were protected by this clause. Although the judgments are not very clear on this point, it is submitted that three lines of reasoning emerge:

(i) Although the bill of lading did not *as such* protect the shipowners, it was a circumstance to be taken into consideration in determining what duty they owed to the plaintiffs: it was even possible that a distinct contract, implied from conduct, arose between the shipowners and the plaintiffs and that this contract incorporated the terms of the bill of lading by tacit reference.[3] No new principle is involved here.

(ii) The shipowners were protected by the bill of lading because they were parties to it since the charterers were agents of the

[1] *e.g.*, *Martin* v. *Great Indian Peninsular Ry.* (1867) 37 L.J.Ex.(N.S.) 27; *Foulkes* v. *Metropolitan & District Ry.* (1880) 5 C.P.D. 157; *Austin* v. *G.W.R.* (1867) L.R. 2 Q.B. 442; *Meux* v. *G. E. R.* [1895] 2 Q.B. 387; *cf. Hayn* v. *Culliford* (1879) 4 C.P.D. 182. *Becker* v. *G. E. R.* (1870) L.R. 5 Q.B. 241, went the other way but this may be because of its rather special facts. *Alton* v. *Midland Ry.* (1865) 19 C.B.(N.S.) 213, also went the other way, but the case cannot stand after *Donoghue* v. *Stevenson* [1932] A.C. 562.

[2] It was not disputed that these words were apt to protect the charterers: [1923] 1 K.B. 422.

[3] It is submitted that this is what Lord Sumner meant when he spoke of a "bailment on terms": [1924] A.C. at p. 564. Lords Dunedin and Carson agreed with Lord Sumner.

shipowners for the purpose of inserting the exemption clause.[4] This again is not new: it is the reasoning which underlies the railway cases.

(iii) The shipowners were protected by the bill of lading in spite of the fact that they were not parties to it on the ground that where a person employs an agent to perform a contract that agent is entitled in performing the contract to any immunity from liability which the contract confers on the principal.[5] This is an interesting and new principle. The question is whether, in the light of later decisions, it represents English law.

In *Cosgrove* v. *Horsfall* (1946) 62 T.L.R. 140 the plaintiff, an employee of the London Passenger Transport Board, was issued with a pass enabling him to travel free of charge[6] on the Board's vehicles. The pass provided that neither the Board "nor their servants" were to be liable to the holder for loss of life or injury. The Court of Appeal held that a servant of the Board was not entitled to the benefit of this clause. But the *Elder, Dempster* case was not cited, and clearly the third line of reasoning which emerges from that case would have produced a different result. In *Adler* v. *Dickson* the defendants therefore argued that *Cosgrove* v. *Horsfall* was wrongly decided as it was inconsistent with the *Elder, Dempster* case.[7] Both Jenkins and Morris L.JJ. repudiated this argument (at pp. 713 and 717 respectively) so that the *Elder, Dempster* case must now be taken to depend on one, or both, of the first two lines of reasoning there advanced. On both these lines of reasoning *Cosgrove* v. *Horsfall* was reconcilable with the *Elder, Dempster* case[8] and once this was established it followed that the defendants in *Adler* v. *Dickson* must fail. In *Cosgrove* v. *Horsfall* the exemption clause expressly purported to exempt the servants from liability. In *Adler* v. *Dickson* the contract only purported to exempt the company from liability for the negligence of its servants.[9] This fact would negative the suggestion that the

[4] Lord Cave, *ibid.*, at p. 534 (first sentence). Lord Carson also agreed with Lord Cave.

[5] Lord Cave, *ibid.*, at p. 534 (second sentence); Lord Finlay, *ibid.*, at p. 547 to 548; Lord Carson, *supra*, note 4.

[6] Nothing turned on the question whether the pass was a contract or a conditional licence.

[7] Unfortunately the *ratio* of the *Elder, Dempster* case cannot be determined by counting heads: see notes 3 to 5 above. Nor, after *Jacobs* v. *L. C. C.* [1950] A.C. 361 does it help matters to say that the third line of reasoning was only a second possible alternative for Lord Cave.

[8] Both these lines of reasoning depend on inferences of fact. The inference of fact required to support the first line of reasoning was so unrealistic that it was not urged on the court; the inference required to support the second line of reasoning was expressly repudiated by the court. This is perfectly consistent with the *Elder, Dempster* case, since that case only decided what was the legal consequence of the inference: it did not lay down when the inference should be drawn.

[9] It is true that on the outside of the ticket there was printed the sentence that "Passengers . . . are carried at passengers' entire risk." But Morris L.J. points out (at p. 715) that this was merely a summary of the conditions printed inside the ticket and that these must be taken to govern the case.

contract affected the duty owed by the crew to the plaintiff, and an implied contract on the same terms would not help the defendants. The same fact also negatived any intention on the part of the company to act as agent for the crew in inserting the clause. Even if the crew had been expressly exempted by the clause, this would not have concluded the matter, as *Cosgrove* v. *Horsfall* shows. Nor would a declaration of agency have been conclusive since the courts have power to go behind such declaration [10]: the question is one of substance, not of drafting. It is submitted that the inference of agency will more readily be drawn where the third party is an independent person and not merely the servant of one of the contracting parties. This is supported by the interesting suggestion made by Jenkins L.J. in the present case (at p. 713) that it is by no means certain that the *Elder, Dempster* case would have been decided the same way had the action been brought against the shipowners' servants instead of against the shipowners themselves.

Denning L.J. alone appears to regard the third line of reasoning which emerges from the *Elder, Dempster* case as good law (at p. 702).[11] A third party may be protected by an exemption clause merely because it is made for his benefit. But although a third party is entitled to the benefit of the clause, a defendant is only subjected to its burden if he freely assents to it (at p. 704). Such assent was given by the plaintiff in *Hall* v. *N. E. Ry.*, but not by the plaintiff in *Cosgrove* v. *Horsfall*. In the present case there was no such assent: the plaintiff could have no idea that the clause exempted the servants since it did not say so (at p. 705). But it is, with respect, difficult to follow this argument. If the terms of the clause are relevant to the issue of assent, no convincing distinction can be drawn between *Cosgrove* v. *Horsfall* and *Hall* v. *N. E. Ry.* If assent is to be proved *aliunde*, again the suggested distinction breaks down, for no evidence was given on this issue in either case. In fact the judgments do not discuss the question of assent at all, but deal with one question and one question only: was there privity of contract between the plaintiff and the defendant?

It remains to consider the desirability of the rule applied in *Adler* v. *Dickson*. As to this, much could be said on both sides.[12] In this particular case the result of the rule was to enable the plaintiff to circumvent the exemption clause, for the employers felt it right and expedient to say that they would satisfy any judgment which might be given against their servants (at p. 700). Few will quarrel with the present trend of judicial opinion which

[10] *Cf. Taddy* v. *Sterious* [1904] 1 Ch. 354.

[11] Indeed he regards the case as establishing that the master and crew were similarly protected, but this was not decided.

[12] Contrast Scrutton L.J. [1923] 1 K.B. 441 to 442 with Jenkins L.J. [1954] 3 W.L.R. 706 to 707.

is hostile to such exemption clauses (see 17 M.L.R. 155), and the result of the present case is in accordance with this judicial policy. But it is as well to remember that all employers may not be so just or so generous as the employers of the present defendants; and that a legal device which depends for its ultimate effectiveness on the bounty of a person who is not a party to the litigation is not in itself praiseworthy, and may have hidden snags which only experience can reveal.[13] Further, in many cases of this kind the question is not whether the plaintiff has an effective claim for compensation, but against whom he has it.[14] It is therefore dangerous to justify the decision in *Adler* v. *Dickson* by relying too heavily on considerations of convenience. Its true justification lies in the principle that in general only a party to a contract can take a benefit under it.

(2) *The burden of the exemption clause.* In *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd* (*supra*) the plaintiffs were sellers of a fire tender under an f.o.b. contract. The buyers made their own arrangements for transport with the shipowners. The fire tender was damaged while it was being lifted on board the ship before the risk had passed to the buyers. In an action by the plaintiffs against the shipowners the latter pleaded that their liability was limited by Articles 2 and 4 (5) of the Schedule to the Carriage of Goods by Sea Act, 1924. These Articles provide that "under every contract of carriage of goods by sea the carrier . . . shall be . . . entitled" to certain limitations of liability. The plaintiffs contended, *inter alia*, that these limitations did not bind them since they were not privy to the contract of affreightment. Devlin J. held, however, that they were bound, since, in making the contract of affreightment, the buyers had acted as agents of the sellers to the extent to which that contract affected the sellers.

Devlin J.'s view that a finding of agency was essential to support this conclusion is in conflict with the dicta of Goddard J. (as he then was) in *Fosbroke-Hobbes* v. *Airwork, Ltd.* (1936) 53 T.L.R. 254.[15] In that case it was said that the guest of a person who had chartered an aeroplane would be bound by an exemption clause contained in the contract between the owner of the aeroplane and the charterer. The learned judge based his view largely on considerations of convenience: "The obligations of the owner cannot be increased by the fact that the person with whom he has made his contract chooses to bring along persons who are in no contractual relations with the owner" (at p. 257). But it

[13] *Cf.* the history of proceedings against the Crown before the Crown Proceedings Act, 1947.

[14] "Of course the real question is which set of underwriters should bear the loss": *per* Scrutton L.J. in the *Elder, Dempster* case [1923] 1 K.B. at 442.

[15] Strictly, the question here discussed need not have been decided since it was held that the exemption clause had not been sufficiently communicated even to the charterer of the aeroplane.

is equally arguable that the guest, who was clearly "in contemplation," should not be deprived of his common law rights by a contract the terms of which he could neither know nor control. Where considerations of convenience are thus evenly balanced, principle should prevail. It is respectfully submitted that the reasoning of Devlin J. is to be preferred to that of Goddard J., as it is in accord with the principle that in general only a party to a contract can be bound by its terms.

G. H. Treitel.

Reciprocity and Common Form in the Conflict of Laws

It has previously been suggested in this *Review* [1] that the decision in *Travers* v. *Holley* [2] means that the English courts will recognise a decree of divorce pronounced by a foreign court, if it is founded on circumstances in which the English courts would assume divorce jurisdiction. If this is so, it is a rare example of acceptance by the English judges of the just foundation of legislation [3] passed to mitigate the hardship of a fiction of the common law.[4] But if the application of such a rule is to be effective, it is important that the courts should have regard to the actual circumstances in which the foreign court assumes jurisdiction, and not permit themselves to be misled by a form of words which, in the nature of things, is unlikely to be identical with that adopted by the English legislature.

In *Dunne* v. *Saban*,[5] Davies J. recently refused to recognise the jurisdiction of the court of Florida to grant to a wife, whose husband was domiciled in England, a decree of divorce said to be based on the two grounds of (1) her acquisition of a separate domicile in Florida and (2) her residence there for a period of 90 days before presentation of her petition.

Davies J. naturally relied heavily on *Travers* v. *Holley* in reaching his decision, and indeed quoted verbatim all but the first quarter of Hodson L.J.'s judgment in that case. Some difficulty is, however, caused by his conclusion [6] that "*Travers* v. *Holley* deals with a case where the foreign court's jurisdiction depended on three years' residence, as does ours in similar circumstances." With great respect, the judgments of all three members of the Court of Appeal in *Travers* v. *Holley* make it clear that the jurisdiction recognised in the court of New South Wales in that case was

[1] By Dr. F. A. Mann (1954) 17 M.L.R., p. 81.
[2] [1953] P. 246. C.A.
[3] Now the Matrimonial Causes Act, 1950, s. 18 (1).
[4] That on marriage a woman loses all power to acquire or relinquish a domicile, and that what the judges are pleased to call her domicile of choice is in fact whatever domicile her husband has at any particular time. This rule, to which there are no exceptions, is one of the remnants of a unity in which the imagination of the judges formerly clothed every husband and wife, no matter how great their separation in time and space.
[5] [1954] 3 W.L.R. 980.
[6] *Ibid.*, 989.

based not on residence, but on the domicile of both parties in New South Wales at the date of the commencement of the desertion by the husband, as distinct from the date of the institution of divorce proceedings by the wife. The whole foundation of the dissenting judgment by Jenkins L.J. was that he did not consider that the husband's initial acquisition of a domicile of choice in New South Wales had been proved. In other words, the jurisdiction assumed by the New South Wales court in *Travers* v. *Holley* corresponded with that exercised by the English courts on the basis of pre-desertion domicile under the Matrimonial Causes Act, 1950, s. 18 (1) (*a*) (which entered English law as the Matrimonial Causes Act, 1937, s. 13), and had nothing to do with the jurisdiction based on three years' residence under section 18 (1) (*b*), (which first reached the Statute-book as the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1)). Indeed, in part of Hodson L.J.'s judgment quoted by Davies J., the following passage occurs: "Since 1937 this exception has been largely extended, first by the Matrimonial Causes (War Marriages) Act, 1944 (a temporary war-time measure), and later by the Matrimonial Causes Act, 1950, s. 18. It is unnecessary to consider these later statutory provisions since, at the material time, when the New South Wales proceedings were instituted, the Act of 1937 was in force, and section 13 of this Act corresponds in substance with the provision under which the New South Wales court claimed jurisdiction."

It is further submitted that, if regard had been had to the actual situation in which jurisdiction had been assumed by the court of Florida in *Dunne* v. *Saban*, rather than the forms of words in which the basis of jurisdiction was expressed, it might have transpired that in this case also the jurisdiction assumed in Florida approximated more nearly to the pre-desertion domicile test embodied in English law by the Matrimonial Causes Act, 1950 s. 18 (1) (*a*), than the three years' residence test of section 18 (1) (*b*).

The couple concerned in *Dunne* v. *Saban* emigrated to the United States of America in June, 1951, sixteen months after their marriage in England, and some twelve months after the wife's parents had emigrated there. The English court was satisfied that the husband then abandoned his domicile of origin in England, and that he and his wife acquired a domicile in Florida. There seems also no doubt that the husband returned alone to England at the end of 1952, with the intention of remaining here, and it was held that he then reverted to his English domicile.

The husband's evidence in England (where the wife was represented only by the Queen's Proctor's Department) was that sometime before he returned to England, his wife had left him and gone to live with her parents: that without his knowledge or consent she applied for American naturalisation in June, 1952; that she refused to accompany him on his return to England, and that she left

unanswered his subsequent invitation to join him here after his return.

A rather different version of at least some of these events had emerged when in July, 1953, the wife took divorce proceedings against him in Florida, subsequently obtaining there a decree dissolving their marriage on the grounds of cruelty. The allegations of cruelty included *inter alia* the fact that he had returned to England without having made any arrangements for her to join him, and had stated that he did not intend to see her again. If the court of Florida had jurisdiction to dissolve the marriage, it would follow that the wife's version of the facts as proved to the satisfaction of the court in Florida, would be accepted by the English courts together with the Florida decree based upon them.

The husband subsequently applied in the English court under the rule in *Har-Shefi* v. *Har-Shefi* [7] for a declaration that his marriage had been validly dissolved by the decree of divorce obtained by his wife in Florida, and the question for decision was whether the English court would recognise the jurisdiction of the court in Florida to dissolve the marriage. Jurisdiction was said to be founded on the wife's domicile in Florida (which involved recognising her ability to acquire a domicile distinct from that of her husband) plus ninety days' actual residence in that state. Davies J. held that, since this did not correspond to any heading under which the English courts assume jurisdiction to dissolve a marriage, the validity of the Florida divorce would not be recognised here. "It seems to me that the statutory exceptions to the law regarding domicile as being the test of the jurisdiction to dissolve a marriage are exceptions, and that the rule, apart from those exceptions, remains in full force. In my judgment the observations in *Travers* v. *Holley* merely decide that this court will recognise the right of other courts to encroach upon the principle of domicile only to the extent to which this court also does. Where, as here, you find a court purporting . . . to exercise jurisdiction upon ninety days' residence, even though that is coupled with something that we do not recognise, namely, a separate domicile of the wife in the United States, the only possible answer which this court can give is to say that the decree of that foreign court was in our law invalid." [8]

It has already been suggested that this approach has regard less to the actual situation of the parties than to the grounds on which the foreign court purported to assume jurisdiction. There seems no doubt that husband and wife went together to Florida and acquired a domicile there. According to English law, by the very act of leaving his wife and returning to England, the husband subsequently changed her domicile without her consent and thus *inter*

[7] [1953] P. 161.
[8] [1954] 3 W.L.R. 980, 989.

alia deprived her of her right of recourse to the courts of the country in which they had agreed to settle, unless she could bring herself under one of the admitted exceptions to the exclusive authority of the courts of her domicile. Eighteen years ago Parliament legislated to mitigate this hardship in respect of wives deserted in England, by the enactment now embodied in the Matrimonial Causes Act, 1950, s. 18 (1) (*a*). It is clear that under this clause the English courts assume jurisdiction to decide whether a wife who applies to them has in fact been deserted by her husband. If, in *Dunne* v. *Saban*, the wife's allegations that the husband had returned to England without making arrangements for her to join him, and had said that he did not intend to see her again, were substantiated to the satisfaction of the court of Florida, they would probably have sufficed to establish desertion in the English sense, so that jurisdiction in Florida might have been founded on pre-desertion domicile corresponding to the grounds embodied in the Matrimonial Causes Act, 1950, s. 18 (1) (*a*). Unfortunately the decree which the wife obtained in Florida does not appear to have described the husband's conduct as desertion, but as extreme cruelty, and it is not even clear whether these specific and all-important allegations were in fact established to the court's satisfaction.

It would seem that if reciprocity in divorce jurisdiction is to be made effective, it is of the utmost importance that further consideration should be given to the question of classification and correlation of the grounds on which jurisdiction is assumed, so that reciprocity is based on facts and not on the form of words in which they are expressed.

O. M. Stone.

Jurisdiction over a Foreign Company

Deverall v. *Grant Advertising Inc.*[1] provides a fresh facet to the jurisdiction of the English courts over a foreign company. Unfortunately for elegance jurisdiction is hard to appreciate without a preliminary recitation of some provisions of the Companies Act, 1948.[2] Part X of that Act contains eight sections applicable solely to "oversea companies" which are described in section 406 as being:

> "companies incorporated outside Great Britain which, after the commencement of this Act, establish a place of business within Great Britain, and companies incorporated outside Great Britain which have before the commencement of this Act, established a place of business within Great Britain and continue to have an established place of business within Great Britain at the commencement of this Act."

[1] [1954] 3 All E.R. 389; [1954] 3 W.L.R. 688. The All E.R. is the fuller report, but see now [1955] Ch. 111.
[2] 10 & 11 Geo. 6, c. 38.

Such a company is subjected at threat of fine [3] to certain obligations, one of which (contained in section 407 (1) (*c*)) is to file with the registrar of companies:

> "the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process and any notices required to be served on the company."

The effect of either compliance or non-compliance is dealt with by section 412:

> "Any process or notice required to be served on an oversea company shall be sufficiently served if addressed to any person whose name has been delivered to the registrar . . . and left at or sent by post to the address which has been so delivered: Provided that—
>
> (*a*) where any such company makes default in delivering to the registrar the name and address of a person resident in Great Britain who is authorised to accept on behalf of the company service of process or notices; or
>
> (*b*) if at any time all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on behalf of the company or by any reason cannot be served;
>
> a document may be served on the company by leaving it at or sending it by post to any place of business established by the company in Great Britain."

In *Deverall's* case the defendant was a company incorporated in Texas which had not complied with section 407, and the plaintiff invoked the proviso in section 412 to justify effecting service by leaving a copy of the writ at certain premises in London. The Court of Appeal, differing from Vaisey J., found as a fact that the defendant had *never* established a place of business in Great Britain, and therefore held inevitably that service had been irregular. However, the court also considered what would have been the position if they had found that the defendant had had a place of business in Great Britain which had ceased to function before the date of service. The court agreed (again differing from Vaisey J.) that service would still have been bad. Jenkins L.J. who delivered the principal judgment, based his opinion on two grounds. He pointed first to the distinction drawn in section 406, and thought that it

> "throws some light on the construction of section 412 because it does not seem to me to accord with the view that, for the purposes of that section, once a company has established a place of business, that place must always remain a place of business established by the company." [4]

Secondly, he was impressed by both the inconvenience of the

[3] Not exceeding £50, or "in the case of a continuing offence, five pounds for every day during which the default continues" (Companies Act, s. 414).

[4] [1954] 3 All E.R. at p. 393.

opposite view and the temptations which it would offer to the unscrupulous where a company changed its place of business.[5] The learned Lord Justice, however, made the interesting and necessary concession that where a company has traded from an address and then ceased to do so without informing those who dealt with it, then that address might be taken as a place of business even though in fact it had ceased to be such.[6]

With all respect, no objection can be taken against the Court of Appeal's opinion on this particular and hitherto undecided point, yet it makes a convenient background and pretext for a brief comment on the three relevant portions of the Companies Act.

Apart from the Companies Act, jurisdiction over a foreign company depends normally on its "carrying on business" in this country at the date of service,[7] but even then jurisdiction cannot be exercised unless service can be effected on "the head officer, or clerk, or secretary."[8] Sections 407 (1) (*c*) and 412 of the Companies Act seem to have been designed not to extend the fundamental rule but merely to render its exercise easier.[9] "Place of business" is admittedly not identical with "carrying on business," but although a company may conceivably carry on business here without establishing a place of business[10] the reverse would seem impossible. Yet compliance with section 407 (1) (*c*) *may* render a company subject to the jurisdiction of the English courts although it neither carries on business nor has a place of business here at the date of service. Such was the considered opinion of Clauson J. in *Sabatier* v. *The Trading Co.*[11] In that case a writ had been served without protest on the person whose name appeared on the file, and the learned judge was prepared to rely on a literal and unassailable construction of section 412[12] to hold that service was good even though the company in question had ceased to carry on or have a place of business in this country. Clauson J.'s opinion was distinguished[13] but not impugned in *Deverall's* case. Shortly after *Sabatier* v. *The Trading Co.* the Companies Act, 1928, introduced[14] the germ of

[5] [1954] 3 All E.R. at pp. 393–4.
[6] [1954] 3 All E.R. at p. 395.
[7] See Farnsworth, *The Residence and Domicil of Corporations* (1939), pp. 148 *et seq.*
[8] R.S.C., Ord. 9, r. 8. For the operation of the rule in this connection see: *Mackereth* v. *Glasgow and South Western Ry.* (1873) L.R. 8 Ex. 149.
[9] *Cf.* Lord Parmoor, *Employers' Liability Assurance Corporation, Ltd.* v. *Sedgwick Collins and Company, Ltd.* [1927] A.C. 95 at p. 115; this reasoning is paramount in Lord Blanesburgh's dissenting speech, *ibid.*, p. 117, esp. at pp. 119 *et seq.*
[10] Halsbury, *Laws of England*, 3rd ed., Vol. 6, p. 842, note (*q*).
[11] [1927] 1 Ch. 495 at p. 507. In *Deverall's* case the result under the Act coincided with the position apart therefrom.
[12] Then s. 274 (2) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).
[13] On the ground that in the earlier case there had been compliance with s. 407 (1) (*c*), [1954] 3 All E.R. at p. 394.
[14] 18 & 19 Geo. 5, c. 23 s. 90 (1); later Companies Act, 1929, s. 349 (19 & 20 Geo. 5, c. 23). The opening phrases of s. 412 have remained materially unaltered since 1908.

the provisos to section 412, and today in equivalent circumstances the proper course would be for the person named to refuse service [15] whereupon the would-be plaintiff could be met by *Deverall's* case. Yet if by accident, spite or misfortune the person named accepts service then the company is subject to the jurisdiction, and no afterthought of his is of avail for he has no *locus standi*.[16] The company itself cannot effectively withdraw from the jurisdiction since the Companies Act provides no method by which a name can be taken off the file without the substitution of a fresh one.[17] The legislature has drawn an invidious distinction between companies which comply with s. 407 and those which do not, and it is the former which are penalised. The distinction was pointed out to the Court of Appeal in *Deverall's* case, but they took perfectly proper refuge in the language of section 412.[18]

The justification for the first part of section 412 is alleged to be that the foreign company—

> "by filing with the registrar of companies the name and address . . . , submit|s|(ted) voluntarily to the jurisdiction of the English courts and, on this account cannot subsequently be heard to object to such jurisdiction." [19]

Without becoming entangled in the complexities of jurisdiction by submission this dictum may at least be dubbed a little extraordinary. Although by carrying on or opening a place of business here a foreign company can [20] be said to have submitted to the jurisdiction it seems somewhat artificial to speak of filing a name under threat of a substantial fine as a voluntary submission. Equally it seems absurd to say that the company submits at large to the jurisdiction for an indefinite period which may not coincide with any real connection the company may retain with this country.[21] The truth of the matter would seem to be that the foundation on which the common law insisted has been sapped unintentionally but unequivocally by statutory machinery which was designed merely to render use of that foundation easier. Such a sapping cannot be justified on the ground that those who trade in this country with a foreign company should be protected against

[15] The decision in *Employers' Liability Assurance Corporation, Ltd.* v. *Sedgwick, Collins and Company, Ltd.* [1927] A.C. 95, that protest by the person named does not invalidate service is presumably reversed by proviso (*b*). *Cf.* Gower, *Modern Company Law* (1954), p. 571, note (30).

[16] *Emil Rind* v. *Anglo Prague Credit Bank* (1940), *Annual Practice*, 1955, p. 77.

[17] Buckley, *Companies Acts*, 12th ed., p. 1026.

[18] [1954] 3 All E.R. at pp. 394–5. It would perhaps be proper to say that *Deverall's* case has endorsed the distinction drawn in *Sabatier* v. *The Trading Co.*

[19] *Employers' Liability Assurance Corporation, Ltd.* v. *Sedgwick, Collins and Company, Ltd.* [1927] A.C. 95 at p. 115, *per* Lord Parmoor; *cf.* also Lord Cave at p. 104, and Lord Sumner at p. 107.

[20] In fact English courts have been reluctant to advance submission as the basis of their jurisdiction over foreign companies: Farnsworth, *op. cit.*, pp. 314, 318.

[21] Clauson J. admitted that s. 412 could operate "somewhat artificially" [1927] 1 Ch. at p. 507.

its sudden departure. For as we have seen the effectiveness of the extended jurisdiction depends on two accidents: (a) the foreign company having complied with section 407 (1) (*c*); and (b) the person named accepting service. If the legislature was minded to grant such protection—and there is no reason to suspect its necessity [22]—a more capricious or indefinite method could hardly have been chosen. A remedy to the present position lies simply in providing a method by which a name could be automatically removed from the file on the company ceasing to have a place of business here, or at the expiration of some reasonable time thereafter sufficient to safeguard creditors.[23]

MICHAEL MANN.

SOVEREIGN IMMUNITY

OVER the last twenty-five years or so there has been room for the impression that the English courts were keeping aloof from every opportunity of curtailing the doctrine of sovereign immunity. The decision of the Court of Appeal in *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274, seemed to be the high-water mark of this development, because the result was particularly inequitable and clearly avoidable: (1949) 12 M.L.R. 494. There followed *Kahan* v. *Pakistan Federation* [1951] 2 K.B. 1003, another decision of the Court of Appeal, which arrived at a result that was certainly not required by public international law and probably not required by previous judicial authority in England: (1952) 15 M.L.R. 220. Finally there came *United States of America* v. *Dollfus Mieg et Cie.*, [1952] A.C. 582, which involved a further, though perhaps less unexpected, extension of the circumstances justifying a foreign sovereign State in intervening in proceedings against an English corporation such as the Bank of England and claiming immunity. In these circumstances it is satisfactory to discover, in the most recent decision of the Judicial Committee of the Privy Council, a check in the tendency to enlarge the realm of the doctrine of sovereign immunity.

In *Juan Ysmael & Co. Inc.* v. *Republic of Indonesia* [1954] 3 All E.R. 236, the plaintiffs as owners claimed possession of a certain steamship against all parties interested in it. The plaintiffs had chartered the vessel to the defendant Republic, but

[22] R.S.C., Ord. 11, r. 1 (e) (i) will normally be available. If the company has left assets within the jurisdiction then a creditor can petition for a winding-up order under s. 399 (5) (*a*) of the Companies Act: *Re Azoff Don Commercial Bank* [1954] Ch. 315. In such a case service out of the jurisdiction could be effected under Ord. 11, r. 8a (*b*). Alternatively substituted service of the petition would seem possible: *Banque des Marchands de Moscou* v. *Kindersley* [1950] 2 All E.R. 105 at p. 110; Ord. 67 r. 6; Companies (Winding-Up) Rules, 1949, rule 227.

[23] s. 413 (2) of the Companies Act offers a convenient context for such a provision. At present the subsection omits any reference to the name and address filed under s. 407 (1) (*c*).

the charterparty came to an end on June 30, 1952, *i.e.* three days after the issue of the writ. On that day the plaintiffs, through their servant, the acting captain, were in legal possession of the ship—indeed in the opinion delivered by Earl Jowitt it is stated that the ship "*always* remained in the legal possession of the appellants" (p. 241) and that "legal possession of the vessel *never* passed to the Government of Indonesia" (p. 241). However, on July 9, 1952, the Republic of Indonesia moved to set aside the writ on the ground, *inter alia*, that it was the owner of the ship. Was this "bare assertion of title" sufficient to entitle the Republic of Indonesia to immunity? Or was it necessary that title should be proved? The Privy Council answered both questions in the negative and laid down the rule that—

> "a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party is not bound, as a condition of obtaining immunity, to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached."

It was held that the Republic's title was manifestly defective in that its only root lay in a purported sale by the plaintiffs' agent who had no authority to sell.

The principle enunciated by the Privy Council bears the stamp of a compromise. On the one hand the Privy Council clearly rejected the view of Scrutton L.J. in *The Jupiter* [1924] P. 236, 244, according to which the bare assertion of title supports a claim to immunity. Perhaps this development will strengthen the impression that it is possible to say about Scrutton L.J. as an international lawyer what Lord Campbell said about another great common lawyer: "But Lord Coke who is so great an authority as to our municipal law is entitled to little respect as a general jurist" (*Magdalena Steam Navigation Co.* v. *Martin* (1859) 2 E. & E. 94, 113). On the other hand the Privy Council refused to follow earlier dicta to the effect that a foreign government claiming immunity must prove its title. In particular in *Haile Selassie* v. *Cable and Wireless Ltd.* [1938] Ch. 839, 844, a strong Court of Appeal (Sir Wilfrid Greene M.R., Scott and Clauson L.JJ.) had made it clear that the doctrine of immunity could not come into operation, unless it was "either admitted or proved that property to which a claim is made either belongs to or is in the possession of, a foreign sovereign or his agent."

Yet it is likely that in practice there will not be too pronounced a difference between the latter principle and the compromise

formulated by the Privy Council. The prima facie case which the Privy Council requires the foreign government to establish is a familiar phenomenon, for instance, in connection with applications for leave to serve a writ outside the jurisdiction: *Vitkovice Horni* v. *Korner* [1951] A.C. 869. In order to " satisfy " the court of the existence of conflicting rights foreign governments are likely, in future, to put all the facts before the court and, in effect, to prove their title, though, of course, cases are conceivable in which a real issue arises and cannot be tried.

The decision of the Privy Council covers a narrow field. It has done nothing to obviate the necessity for a review of the whole of the doctrine of sovereign immunity. This is a problem which has developed in a wholly unsatisfactory manner and about which, therefore, a few words of a more general character should be added.

On November 23, 1949, when speaking in the House of Lords, the then Lord Chancellor, Lord Jowitt, acknowledged the existence of the grave problem—

> " whether the law of this country affords to organs of foreign states a wider immunity than is desirable or strictly required by the principles of international law observed in the countries of the world. That question is one of considerable importance and difficulty. I believe it to be the fact that our law differs in this respect from the French law, and it is wider than the project of law formulated in the United States. Its importance increases owing to the general increase of state activities of the present day and their extension into the realm of commerce and trade. We have therefore decided to set up an Inter-Departmental Committee to consider and report on this question which raises issues of very considerable difficulty and in which, of course, International Law and our relationship with foreign countries is concerned. We must remember that anything we do here must be reciprocal—it must affect us as it affects others."
>
> (House of Lords Debates, Vol. 165, col. 940.)

On February 13, 1953, the Under Secretary of State for Foreign Affairs, Mr. Nutting, stated in the House of Commons that the Inter-Departmental Committee on State Immunities had—

> " found such great divergencies in state practice as to make it difficult to establish the exact position under international law. In view of the differing opinions among the members of the Committee as to what principles it would be best to follow the Committee was unable to reach any final conclusions or make any final recommendations. Since it is clear that further study would not achieve any different result, it has been decided not to call upon the Committee for any further or final report and the Committee must now therefore be regarded as *functus officio*."
>
> (House of Commons Debates, Vol. 511, *col.* 81.)

Whatever views may be held on the substance of the matter, so poor an outcome of so promising a venture gives cause for regret.

That there exist divergencies in state practice was obvious from the beginning, though as a result of developments in the United States of America in 1952 (Department of State Bulletin Vol. xxvi, 984) they are likely to decrease and to emphasise this country's isolation. But such divergencies exist in most branches of international law. The development of international law would be stultified if they were allowed to sanction a policy of *désistement* rather than action. That members of a Committee express different views is a common experience, but it is perhaps a little less common to make the completion of a Committee's labours dependent upon its members accepting the rule of unanimity. In any event, to abstain from publishing the preliminary report which the Committee seems to have rendered, to disband the Committee without creating a new one, to shelve the problem and its solution—this is a policy which will engender feelings of disappointment and frustration. It is a policy which, it is submitted, should be reversed.

F. A. Mann

European Coal and Steel Community

The Government of the French Republic v. *The High Authority*

The Government of the Italian Republic v. *The High Authority*

The Court of Justice of the European Coal and Steel Community delivered its first two judgments on December 21, 1954, in two actions—one brought by the French and one by the Italian Governments against the High Authority, the supranational "directors" of the Community.[1] Both actions sought the annulment of the decisions of the High Authority 1/54, 2/54 and 3/54, published in the *Journal Officiel de la C. E. C. A.* on January 13, 1954. As the judgments in the two cases are almost identical, they will here be treated together.

In its judgment the validity of decisions 1/54 and 3/54 was established, but the court annulled para. 1 of decision 2/54 as having been passed in violation of Article 60 of the Treaty.

Article 60, para. 2 (a) of the Treaty lays down that "Price scales and conditions of sale applied by enterprises on the common market shall be made public to the extent and under the conditions prescribed by the High Authority." Detailed rules for this publication were set out by the High Authority in the *Journal Officiel* of May 4, 1953, but these rules were amended by para. 1 of 2/54 which, in effect, allowed enterprises to alter their prices from those

[1] Published in the *Journal Officiel*, Jan. 11, 1955, pp. 547 and 560.

in their published price scales, provided the alterations did not amount to an increase or decrease of more than 2·5 per cent.

In construing the terms of Article 60, para. 2 (a) the court held that the requirement that " price scales shall be made public " is " a rule of strict law from which no derogation is permissible," and further, that read with the rest of para. 2 this provision clearly requires publication of prices before they are enforced on the common market. Moreover, the court held that " prices " implies the exact prices and not average or approximate ones.

" If the Treaty thus unequivocally requires prior publication of exact prices, it follows that the power granted to the High Authority to determine the extent and the conditions of this publication does not allow it to violate the principle of the obligatory publication of exact prices."

Decision 2/54 was therefore held to be a violation of the Treaty.

Although as an interpretation of merely one article of the Treaty, this judgment has clearly a limited value, yet it contains certain points well worthy of consideration.

Thus, although the appellants only alleged violation of the Treaty and *détournement de pouvoir*, the court, of itself, considered whether decision 2/54 had been passed in violation of a substantial procedural requirement. The importance of this action on the part of the court is that by Article 33 of the Treaty an appeal against a decision of the High Authority can only be brought on one or more of four grounds, but only where *détournement de pouvoir* or a patent misconstruction of the Treaty is alleged can the court consider the High Authority's assessment of the economic facts and circumstances in the light of which the decision was originally passed. It is an open question whether an appellant by merely including one of these two grounds in its action can confer this power of assessment upon the court: it must now be queried whether on the authority of these cases, the court, of itself, by considering either of these two heads, when they have not been alleged, can enlarge its own powers.

One of the allegations of the appellants in support of their charge of *détournement de pouvoir* was that the legalising, by 2/54, of variations from the price scales as published was undertaken by the High Authority so that it might not have to consider, under Article 64 of the Treaty, whether to take punitive action against enterprises that were in fact varying prices. On this point the court declared, in words that seem of the highest importance in assessing the efficacy of a charge of *détournement de pouvoir* under Article 33: " Even if the decisions challenged have been prompted in part by the notion of introducing a new system more able to be complied with by enterprises than the old, one cannot from that conclude that it was intended to legalise contravention already committed . . . Even if an unlawful intention—such as a desire to avoid imposing sanctions upon defaulting enterprises—were

present together with other motives that did justify the action of the High Authority, the decisions would not from that fact be vitiated by *détournement de pouvoir* provided they did not violate the essential aim which was the prohibition of unfair competitive practices." On this principle the court rejected the plea of *détournement de pouvoir.*

The court has power to apportion costs between the parties where each has lost on one or more counts. In these two cases the appellants were successful in their challenge of decision 2/54 para. 1, but lost in their challenge of decisions 1/54 and 3/54 as well as against 2/54 para. 2. Had the French Government not expressly renounced its intention of asking for costs, the court would have condemned the High Authority to pay half of them. Both appellants, at the oral hearing of their cases, amended their original *requête* and, as regards 2/54, merely challenged the validity of paras. 1 and 2, and not the whole of that decision. The interest of this lies in the fact that the Rules of the court are silent upon the extent or even the existence of this power of amendment. One may wonder in fact how far this power can be employed. The court in these cases expressly decided that a challenge of three decisions of the High Authority might properly be made by means of one action. It is thus queried whether the appellants would have been allowed to amend their action so as to have dropped their challenge of decisions 1/54 and 3/54 and limited it merely to 2/54 para. 1. Thus by not losing on any counts, the court would have been compelled, under Article 60 of the Rules, to award full costs against the defendants. It is felt that some further rules of the court concerning pleading would not be out of place.

Para. 1 of decision 2/54 having been annulled, in accordance with the strict separation of powers that exists within the Community, by Article 34 of the Treaty the matter is referred back to the High Authority which is required to take the measures that comprise the carrying out of the decision of annulment under pain of a further action being brought against it for an indemnity.

D. G. Valentine.

REVIEWS

THE CONTRACTS OF PUBLIC AUTHORITIES: A COMPARATIVE STUDY. By J. D. B. MITCHELL, LL.B., PH.D. [London School of Economics: George Bell & Sons, Ltd. xxxi and 244 pp. 25s.]

SINCE the War a large number of young lawyers has joined the ranks of university teachers of law. Hitherto it has not been possible to judge whether any distinguished jurists will emerge from their ranks because its members have been preoccupied with the preparation of teaching courses, the editing of standard works (where a high level has been attained) and perhaps with the publication of short and ephemeral "bread and butter" articles and notes as tangible support for a claim to promotion on the university ladder. As full-scale works by those of this generation are now being produced, there is more material on which to rest a judgment. The latest is this comparative survey of the contracts of public authorities by J. D. B. Mitchell, recently appointed Professor of Constitutional Law in the University of Edinburgh.

His concern is with the field of conflict between the concept of sanctity of contractual obligations and the general powers of the State. His thesis is that a legal principle of "governmental effectiveness" is of widespread application, and that in relation to contracts it means that no contract would be enforced when some essential governmental activity would be thereby rendered impossible or seriously impeded. "Governmental activity" connotes not only activities of the central government but also those of local and other public authorities provided that, in any event, the activity is so important that interference with it would be of considerable disadvantage to the community.

He proceeds to discuss this principle in the light of English cases; especially *The Amphitrite*[1] with its decision that the Crown "cannot by contract hamper its freedom of action in matters which concern the welfare of the State," and those dealing with the dismissibility of Crown servants and the need for parliamentary approval of expenditure. He contends that all these cases on public contracts are reconcilable with his doctrine of "governmental effectiveness." His criticism of the alleged rule that a body to whom a discretion has been entrusted cannot bind itself as to the manner of exercising that discretion in the future is brilliant in its utilisation of the American discussions on governmental/proprietary functions, in its demonstration of the comparable position of the Crown and other public bodies, leading to the conclusion that what is involved is not a question of incapacity to contract but the problem of to what extent there is a power (based on public policy) to override contractual obligations.

The author next turns his attention to the U.S.A. Particularly refreshing is the courageous way in which he tackles the constitutional problems of the contract clause, eminent domain, police powers, tax immunities and rate regulation; he is not content to take the easy course of concentrating on those aspects of Federal contracts which are comparatively "untainted" by legal problems of the Constitution. Not only is this the clearest short account of the working of these rules read by your reviewer, but also the recognition in the U.S.A. that the principle of sanctity of contracts must give way in some circumstances to the necessities of government is strikingly demonstrated.

There follows a clear account of the French *contrat administratif* where special rules apply to certain contracts having *le but de service public*. Professor Mitchell admires many of the fundamental changes in the law of

[1] [1921] 3 K.B. 500.

contracts to be found there: especially the principle that the State may modify contracts in the interests of government provided that appropriate financial adjustment is made so as not to deprive the contractor of his promised advantages under the original contract.

His conclusion is that public and private law are distinct: that bodies performing public services must be subject to a different law of contract whenever the contractual obligation of the public authority is to be loosened, without prejudice to the individual contractor in those cases where the nature of the contract and an objective consideration of its terms make such a separate law of administrative contracts essential.

This is comparative law at its best: a thorough assimilation of the foreign authorities (no mere undigested translation of students' textbooks), no distortion of the foreign law to fit a preconceived scheme, clear presentation without evasion of the difficulties where the material for comparison has to be quarried, positive and constructive conclusions fairly based on close argument. Incidentally, it is a reflection of the greatly improved library facilities in England in respect of comparative law that so comprehensive a work could be written from material collected from English library sources.

A few scattered criticisms may be relevant. When the author's footnote references and occasional asides show his intimate acquaintance with these matters it is perhaps to be regretted that he has written so little on the content of the standard forms for governmental contracts in use in the United Kingdom and the U.S.A. (for a comparison with the law of *contrat administratif* might have been instructive); other sources which merit more attention are the provisions of the various statutes setting up administrative bodies, private Acts, Standing Orders of the House of Commons, Treasury regulations and the several accounts of Treasury practice now available in the History of the Second World War Series and elsewhere. It is doubtful, too, whether the position of the *fonctionnaire* in the French system can properly be understood unless the recourse for *excès de pouvoir* is considered more fully. Presumably the book was at too advanced a stage when *Att.-Gen. for Ceylon* v. *De Silva*[2] and *Terrell* v. *Secretary of State for the Colonies*[3] were reported for them to receive the treatment in the text which their importance demands. Sometimes it is difficult to decide whether the author is stating what he believes English law to be, or what he believes it ought to be, or what he predicts that the judges are in future going to make it: this is particularly the case with his discussion of the claim of a contractor for compensation (as distinct from damages) when the public authority finds it necessary to break a contract.

One post-war recruit to law teaching has shown here that he is a jurist equipped to maintain the standards set by the giants of yesterday.

H. Street.

Anglo-Saxon Writs. Edited by F. E. Harmer. [Manchester University Press. 1952. xxii and 604 pp. 2 plates. 56s.]

Rarely, indeed, does there appear a work of such accomplished scholarship as this. The text and translation of 121 Anglo-Saxon writs is given, grouped according to the great monastic houses in whose cartularies they are found. There survive but two originals, to which must be added one "partially" authentic, another "probably," and yet another "possibly." To each group there is an introduction upon the house in question and the writs preserved or copied in its archives, with discussions of their authenticity and their significance for the history of law, institutions and society. Over 100 pages of notes

[2] [1953] A.C. 461.
[3] [1953] 2 Q.B. 482.

give an elaborate exegesis, textual, philological, topographical and legal, and bring to bear upon the documents all the resources of historical technique. Add to this a most interesting and useful biographical dictionary of persons (with their dates redetermined), and a really first-rate index, and it will be seen how exhaustively these precious documents have been studied.

Even so, the most remarkable part of this volume has still to be mentioned, namely, the general introduction where the history of the writ and its attendant problems is discussed in 118 pages of high interest and importance. The oldest still extant come from the beginning of the eleventh century, but a casual remark of King Alfred shows that his "written message with seal" was already familiar enough to be used as an illustration in homiletic writing. The initial protocol of a writ was of the briefest: the sender's name, and a greeting to the addressee, after which it plunges at once into business. There may or may not be a final valediction, and the presence of the seal is not announced in the writ. Nevertheless, the seal was so constantly present that the whole document could be familiarly called "a seal" just as later ages spoke of "a green wax" or "a privy seal," meaning a document thus authenticated (*cf.* A. de Bouard, *Diplomatique,* i, 334).

The gap in evidence between Alfred and Æthelred is surely apparent rather than real, for "writs" throughout the Middle Ages must have been used for all sorts of business, and many must have been of only temporary interest with no claim to preservation. Those which have survived have done so for the obvious reason that they announce dispositions of land, immunities and matters closely touching property rights. Consequently, the relationship of the writ and the solemn charter or diploma is immediately raised. Here Miss Harmer has to deal shortly but trenchantly with controversial matters between Giry, Bresslau and W. H. Stevenson, showing that some ill-considered words of the last-named were responsible for some of the errors in Winfield's *Chief Sources,* 290 *et seq.*

The fact that the Anglo-Saxon writ bore a pendant seal naturally leads the author to plunge into the midst of the centuries-old debate on the seals of the Anglo-Saxon Kings, the question whether they had a Chancery before the Conquest, whether they had also a Chancellor, and whether the ever-famous Regenbald occupied that office. Miss Harmer's conclusion is that there is no satisfactory evidence for the office before 1066, and that the first authentic Chancellor known is Herfast (1068).

A long and extremely interesting section deals with the history of seals. They had long been used on the Continent either as wax seals affixed *en placard,* or as metal seals (such as "bulls") pendant on strings. It seems to have been the Anglo-Saxons who invented the device of a wax seal *sur simple queue,* which later spread far and wide. "Great" seals have a separate history, and here Otto III set the style for Edward the Confessor, though the latter contributed the innovation of making his great seal double-faced with two separate designs. Some very puzzling circumstances about documents sealed with the Confessor's seals (three different types have been predicated) lead to the supposition that a matrix continued to be used surreptitiously after his death.

As one would expect, there is a detailed discussion of the contents, style and language of the writs, and Miss Harmer gives a critical list, annotated with the most modern opinions, of the rights (such as *sac* and *soc* and others) which figure in the documents. It would seem that in fact our surviving writs represent a special class which was concerned with law and property, and that the older and familiar writ-form was employed in this new connection from the reign of Ethelred II onwards. That King legislated at great length and of deliberate purpose. In one passage of his laws we read: "... but this practice has been stopped by our lord; may he succeed in stopping more!" (V. Æthelred 32. 5). One of the "practices" was the revival of long dormant claims to land. It may be that in considering this problem it occurred to him or his counsellors to enact the primitive statute of limitation in III Æthelred 14 (*cf.* the common law "continual claim"), and it might well be that as a part

of the same policy of clarifying land law the King hit upon the device of using his writ to announce to the local public important transactions concerning land.

For the most part, these writs announce to the notables of the shire what the King has done; sometimes they expressly authorise the grantee to make a solemn *landboc* as the final record, but it was inevitable that the writ should finally have acquired superior authority. As Miss Harmer observes (p. 37): "It is worthy of note that in Domesday Book the appeal is not to the land-book or *privilegium*, but to the *brevis et sigillum* of King Edward." And so the writ, having first been merely an administrative letter, became a document of title.

The writ has still to reach its last stage, as an instrument initiating litigation. That history is mainly post-Conquest, but not entirely, for its beginnings can be seen in this volume. Not that any specimens (originals or copies) have survived—there is no reason why they should have been kept, once they had served their purpose—but unfortunately writs of this sort are sometimes referred to in narratives in terms that leave no doubt as to their nature and function. Here, too, it seems that Æthelred is the innovator. The two known passages of this sort are printed here on p. 541, Nos. 1 and 2 (with comment on pp. 19 and 47). Both concern cases of difficulty and importance, and in both the King sent "his writ and seal" to the shire commanding them to terminate the case justly—words strongly reminiscent of the writs beginning with "*justicies*," and of certain other viscontial writs with their concluding words *et inde juste deduci facias*. It is no doubt rash to carry the argument so much further than Miss Harmer has done, and it must be confessed that nothing like a collection of early post-Conquest writs has yet been put together; nevertheless it is difficult to resist the impression that here is a royal writ commanding the shire to entertain a specific piece of litigation. Writ No. 17 may also have some bearing on the question.

There is much else that might be mentioned, but enough has been said to show the high importance for legal history of this distinguished work.

T. F. T. Plucknett.

Arnould on Marine Insurance. Fourteenth edition by Lord Chorley. [London: Stevens & Sons, Ltd. 1954. Vol. 1, lxxxiii and 497 pp.; Vol. 2, 850 (with Index). £8 8s. net.]

Arnould on *Marine Insurance* has now reached its fourteenth edition, and the new edition worthily upholds the tradition of its predecessors. One change which is immediately noticeable is in the colour of the binding; the familiar green boards having given place to black. Changes in the body of the book are comparatively few, and this, though it may set a problem for the reviewer, is not necessarily a matter for regret. The law of marine insurance has from its earliest beginnings developed slowly; in the ten years that have passed since the end of the Second World War there have been scarcely a dozen marine insurance cases, and certainly not more than two or three of real importance. Nevertheless, it is unfortunate that there was not time to give more than brief notice to the decision of the Court of Appeal in *Atlantic Maritime* v. *Gibbon* [1954] 1 Q.B. 88, which resolved a certain ambiguity in *Cory* v. *Burr*, 8 App. Cas. 393, and shed some further light on the "loss of time" clause. Although the amount of new law that had to be incorporated in this edition was small, the time for its preparation was unexpectedly curtailed owing to the thirteenth edition going out of print, and the learned editor therefore had to confine himself, in the main, to holding the ground already won. In these circumstances it might perhaps be useful to consider the position that the book has now reached, with particular reference to that "extensive reconstruction and rewriting," the need for which the present editor forecast in his preface to the thirteenth edition.

Arnould is now well past its century, and has for most of its life enjoyed the position of the leading English authority on the subject. At the present time there is no other textbook which affords the same combination of a scholarly exposition of principle with a detailed and acute analysis of particular problems and cases, and the author's opinion upon doubtful points rightly carries great weight. Certainly one cannot dissent from the view, expressed in the preface to this edition, that it would be a mistake to make so many and such drastic alterations in the substance of the work that it would cease to be familiar to its many users. On the other hand, the feeling has been growing for some time that Arnould needs a more comprehensive overhaul than has been possible in recent editions. There have been two great changes in the application, if not in the fundamentals, of the law since the book was written; the one brought about by the passing, in 1906, of the Marine Insurance Act, and the other by the virtual supersession of the common form of policy by standard sets of Institute Clauses, usually incorporated *in toto* into the contract, many of which both define the risks insured against, and lay down the conditions of underwriters' liability. The second of these changes is much less fully reflected in the pages of Arnould than the first. In "all risks" policies, now frequently met with, or in policies against special risks not contemplated in the standard form of policy, very difficult problems can and do arise concerning the scope of the cover provided and, especially, the effect of the statutory exceptions of delay and inherent vice, and the treatment of these and kindred subjects is now somewhat inadequate. On the other hand, there are topics—in the long chapter on General Average, for example—which are dealt with at length in Arnould, but whose practical importance has for one reason or another declined, the discussion of which might now be condensed.

There are also, throughout the book, points of detail, all small in themselves, on which alterations seem to be necessary, and this is a matter of almost greater importance for the practitioner, than those already mentioned. These points fall into several categories; a few have been caused by changes in the law; some arise where later editors have differed from Arnould's view but have not made it clear which is now to be preferred; some, where the point of submissions or comments is no longer clear; some are due to the process of rewriting or rearranging over several editions, as a result of which the apparatus of references and cross-references has in places got out of focus. A few examples of these points must suffice.

The final paragraph of § 1205 on p. 1101 is directly contradictory, on an important point, of the observations in n. 26. In § 1076, p. 984, it is made to appear that the words of Lord Abinger there quoted were spoken in *Glennie* v. *London Assurance* and not, as in fact they were, in *Roux* v. *Salvador*. On p. 816, n. 73, dealing with the case of *Otago, etc. Association* v. *Thompson* does not state the important fact that Hamilton J. reached his decision on the meaning of "loss" only on evidence from underwriters that the word had a recognised special meaning in that particular context. On p. 200, the case reference to *Lynch* v. *Hamilton* in n. 12 might mystify readers unfamiliar with the organisation of the courts before 1875. The cross-references in nn. 3 and 4 on p. 126, and in n. 28 on p. 213, appear to be wrong. Finally, one cannot but regret that the page and section numbers are still printed in identical type—a source of much confusion and irritation. The footnotes, also, are numbered in type too small to be comfortably legible.

One repeats, however, that these are small matters, and these criticisms in no way detract from the credit that is due to Lord Chorley for his work in undertaking the last two editions single-handed. All readers of Arnould will be particularly grateful to him for the revised Chapter 3, in which the underlying principles of the important but, of recent years, somewhat neglected subject of construction are once more thrown into sharp relief.

C. T. Bailhache.

Civil Rights in Immigration. By Milton R. Konvitz. [Ithaca: Cornell University Press; London: Geoffrey Cumberlege. 1953. xii and 216 pp. 28s.]

In 1946 Professor Konvitz published a detailed study on *The Alien and the Asiatic in American Law*. He has now supplemented this by a small book dealing with "discrimination on account of race, color, creed, opinion, or national origin in our legislation relating to the admission and exclusion of immigrants, deportation, and naturalisation." Since the scope of this second work is somewhat narrower than that of the earlier, it means that Professor Konvitz has only revised and brought up to date those chapters of his 1946 work which relate to admission and exclusion, deportation, and naturalisation. It is to be hoped that some time in the near future he will find the opportunity to bring his earlier study completely up to date.

One of the regulations which has brought United States regulations on aliens into disfavour is that which relates to former association with a subversive organisation and on this Professor Konvitz suggests that "past membership in or affiliation with a subversive organisation should not bar entry, if such membership or affiliation was involuntary, without regard to the age of the person when he was a member or an affiliate, without regard to the fact that he severed his relations with the organisation five years or one year ago; and without regard to the question whether he has been, since termination of membership or affiliation, "actively opposed" to subversive ideologies. . . . External indicia may camouflage the innocent or penalise the guilty. They ought to have evidentiary value but be subject to intelligent and informed interpretation by responsible officials." At the same time he calls for an end to the practice whereby a resident alien returning to the United States is regarded as a new entrant, no matter how brief his departure nor how long his original residence.

At the present moment an alien is subject to deportation from the United States at any time, for residence is a concession and not a right. Professor Konvitz would like to see deportation reduced to its original function as an adjuct of the exclusion process. While he recognises that an alien who has secured entry by fraud should be subject to deportation, he is convinced that one whose entry was legal should be exempt from deportation, and that his sole liability for criminal or subversive activities should be that which is established for citizens committing the same offence. Similarly, he considers that denaturalisation should be reserved for those who have secured naturalisation by fraud, and should never be applied as a punishment for conduct subsequent to the acquisition of citizenship. Ideally this may be a desirable situation, but in the first place it overlooks the unnaturalised alien who is a prey upon society or an habitual criminal and who might, because of his police record, never be able to secure naturalisation, and in the second instance it ignores the naturalised citizen who indulges in espionage or who has secured naturalisation with the intention of pursuing a life of crime secure in the knowledge that he cannot because of his citizenship be deported.

Whatever criticisms one may have of the system described by Professor Konvitz in his book and however much one might desire to see its more reactionary and illiberal features removed, *Civil Rights in Immigration* in itself stands to a great extent as a vindication of the American way of life and of the reality of democracy within it. It is only within a democracy that books of the type written by Professor Konvitz could be published or could serve any purpose by their publication.

L. C. Green.

THE LAW AND PRACTICE OF DIVORCE AND MATRIMONIAL CAUSES. By D. TOLSTOY. [London: Sweet & Maxwell, Ltd. 1954. xlviii and 503 pp. (with index). £2 2s. net.]

THE publishers commend this third edition of Tolstoy by saying that it "achieves its compactness, as it does clarity, by stating the law as it is without discussion." This is an apt description of the method used throughout the book, but the compactness and clarity are occasionally secured at the expense of understatement though the formulation of principles is mainly accurate as well as terse. The last edition was published in 1949, and subsequently the Matrimonial Causes Act and Rules of 1950 have consolidated much of the statutory substantive and procedural law. Apart, therefore, from legal development, this edition will be appreciated for its references to present legislation. But greater changes have occurred in the substantive law made by the courts. In particular, the judges have attempted to define the limits of constructive desertion and to formulate the conception of intention in cases of cruelty. This edition describes most adequately the doctrine of constructive desertion. The amplification given by Denning L.J. in *Timmins* [1953] 1 W.L.R. 757, of the generalisation in *Pike* [1953] 1 All E.R. 232, that "it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty" could not be better expressed than in the statement on p. 38 that "There may be conduct which falls short of cruelty, either because it lacks the element of injury to health or because it lacks the element of intention to injure . . . but such conduct will nevertheless be sufficient to found constructive desertion, provided it is grave and weighty; similarly there can be constructive desertion where the conduct complained of is different from cruelty, provided always that such conduct is grave and weighty." When dealing with the intention necessary for cruelty, however, the result of compression is less felicitous. It was said in *Westall* (1949) 65 T.L.R. 337, that the respondent's conduct must be "aimed at" the petitioner. This ambiguous phrase has little inherent meaning without the illumination given by Denning L.J. in *Kaslefsky* [1951] P. 38, where he explained that it includes actions or words actually or physically directed at the petitioner, and also conduct, such as drunkenness, gambling or crime, which is not physically directed at the petitioner, provided that the intention to injure can be shown which "may readily be inferred from the fact that it is the natural consequence of the conduct, *specially where the one knows, or it has been brought to his notice, what the consequences will be*, and nevertheless he does it, careless or indifferent whether it distresses the other or not." The words put by the present writer into italics have been shown by later cases to be crucial, yet no suggestion is given on p. 57, where this subject is discussed, that the respondent should be shown to have notice of the consequences of his conduct in such cases. Over-compression is also apparent on p. 63, where divorce for unsoundness of mind is treated. The Matrimonial Causes Act, 1950, s. 1 (1) (*d*), requires that the respondent shall be incurably of unsound mind, and shall have been continuously under care and treatment for five years preceding presentation of the petition, and section 1 (2) provides that a person of unsound mind shall be deemed to be under care and treatment while he is "detained" under the conditions mentioned in the subsection. *Safford* [1944] P. 61, is represented as deciding that "detention is a status which . . . continues so long as the person is certified, including periods of leave from the mental institution with no restraint on his movements; detention ends when certification ends." But the explanation given by Lord Greene M.R. in *Safford*, was not merely that detention was a status, but a status during the existence of which certain methods of care and treatment were prescribed; and for that reason continuance of detention was not broken by, for example, absence on trial, or the sending or taking of a private patient to a specified place for the benefit of his health, or absence for a period not exceeding forty-eight hours by permission, because those prescribed occasions were not interruptions of the care and treatment but part of it.

There are, however, few such instances of excessive compression, and in general the book contains clear, accurate and concise statements of law well supported by footnotes adding illuminating comment to the cases cited. Since its inception in 1946 Tolstoy has acquired popularity among students and practitioners, who will welcome this edition which maintains the high standard of completeness achieved by its predecessors.

C. E. P. D.

Cases on the Law of Contract. Second edition. By G. C. Cheshire, D.C.L., F.B.A., and C. H. S. Fifoot, M.A., F.B.A. [London: Butterworth & Co. (Publishers), Ltd. 1954. xxiii and 447 pp. 40s. net.]

This edition differs from the first (reviewed in Vol. 9, p. 334 of this *Review*), in that twenty-five cases have been added to replace thirteen which have been omitted. This increase in the representative character and practical utility of the book has been achieved without any sacrifice of the high standards of skill and scholarship with which the cases have been selected and edited. The reason for most of the omissions is obvious, as in the case of *Hyams* v. *Stuart King*, which has been replaced by *Hill* v. *William Hill*, but it is not so easy to see why *Re O'Shea* had to make room for *MacDonald* v. *Green*. It is also with regret that one notes the omission of *With* v. *O'Flanagan*, which provides a most instructive illustration of a continuing representation even if similar facts cannot recur again; the omission of *Callisher* v. *Bischoffsheim* leaves only five cases, including the *High Trees* case and *Combe* v. *Combe*, on consideration. If space was short the four cases on section 4 of the Statute of Frauds might have been left out. Quite apart from the Law Reform (Enforcement of Contracts) Act, which came into force when the production of this book may have been too far advanced, these cases belonged to the law of evidence more than to the general principles of contract. It is also surprising to find that next to *Cundy* v. *Lindsay* there appears now the judgment of Blackburn J. in the court of first instance. With no more than a footnote in the authors' textbook to guide the student, he is as likely to be confused as to be instructed by this judgment, which seems to anticipate the line of reasoning sufficiently represented by *Phillips* v. *Brooks*. *Craddock* v. *Hunt* has been retained, although a more recent and more instructive case on rectification is now available in *Rose* v. *Pim*.

Altogether, this new edition is not principally concerned to bring the book up to date. Less than half of the twenty-five cases were decided since 1946, when the first edition appeared. On the other hand, most of these cases contain judgments of Lord Justice Denning, a fair and accurate indication of the powerful influence which he has exercised on the law of contract in general, and, in particular, on the evolution of the authors' textbook. Although a number of second judgments have been omitted, care has been taken not to do this whenever the views of Lord Justice Denning have been in advance of those of his brethren.

Finally, it may be questioned whether *Luxor* v. *Cooper* would not find a more fitting place by the side of *The Moorcock*, rather than under the heading of agency. This applies of course, also to the textbook where indeed (on p. 374), any intention to deal with the special contract of agency is expressly disclaimed. Again, *Davies* v. *Collins* has little to do with assignment under which heading it has been given. It should find a place next to cases dealing with the construction of exemption clauses, such as *Wallis* v. *Pratt* and *L'Estrange* v. *Graucob*, where it might serve to show the need for some caution when using restrictive interpretation to defeat oppressive exemption clauses. The surprising possibilities of the reasoning employed in *Davis* v. *Collins* have been demonstrated recently in *Woolmer* v. *Delmer Price, Ltd.*

J. Unger.

CASES IN CONSTITUTIONAL LAW. Fourth edition, revised. By D. L. KEIR, KT., M.A., LL.D., Master of Balliol College, Oxford, and F. H. LAWSON, M.A., D.C.L., of Gray's Inn, Barrister-at-Law, and Professor of Comparative Law in the University of Oxford. [Oxford: at the Clarendon Press. 1954. xxxvi and 544 pp. 35s. net.]

THOSE of us who, as students, had prized Keir and Lawson as the most outstanding of our casebooks, had long deplored the necessity of adding cautionary words when recommending it to our own students. The first edition had appeared in 1928, the second in 1933; the third edition, published in 1948, was the second edition with a monstrously enlarged appendix. Now at last the whole work has been revised and reset, and eulogies can again be pronounced in the first lecture of the session.

Keir and Lawson has always been far more than a casebook. From the first the admirable essays which introduce each chapter have been its outstanding feature. The authors have stated that the task of writing them was undertaken partly because of the absence of any single work dealing with constitutional law on the lines they had contemplated. Although this reason for including the introductory essays has now disappeared, the authors have decided to retain them. It would indeed have been a shocking thing had they decided otherwise, for without them the book would be bereft of its grace and character. The essays are not only informative but stimulating; they have an uncommon vigour and freshness; and the historical and comparative approach of the authors makes the book more readily intelligible than perhaps any other work on English public law to the non-lawyer and the foreign student.

There are many changes in the new edition. The most important are as follows: the chapter on "The Crown and Foreign Affairs" has been transferred to the brilliant chapter on "Prerogative"; there is a long new chapter on "Judicial Control of Public Authorities," divided into four sections, with seventy pages of introductory comment; the chapter on "Allegiance" has gone because it is now thought to be unsuitable for treatment in a casebook; the chapter on "The Overseas Dominions of the Crown" has been rewritten and is now entitled the "The Law and the Commonwealth"; extracts from several apposite Australian decisions have been incorporated. The chapter on "Judicial Control of Public Authorities" gives due weight to the growing importance of administrative law, and it would be difficult to improve upon the authors' own contributions. There is a particularly good analysis of the enfeeblement of the *audi alteram partem* principle in recent decisions. The suggestion that appeals should lie from administrative tribunals to specialist judges of the King's [*sic*] Bench Division (355), on grounds not limited apparently, to matters of law, may not, however, command general support.

If the comments that follow are often critical, enough has already been said to make it clear that the reviewer's *cliché*, "these are small matters," can in this case at least be uttered with genuine conviction. In any discussion of the sovereignty of the United Kingdom Parliament, account will now have to be taken of Lord Cooper's judgment in *MacCormick* v. *Lord Advocate* 1953 S.C. 396. It is not quite accurate to say that "subordinate legislative instruments take effect only when they are published to the outside world" (25). The statement that "The Crown suffers from a contractual disability, in that it cannot contract at all so as to fetter its future executive action" (196) may be nothing more than one formulation of the *ratio decidendi* in the *Amphitrite* case, but it could be read as expressing the authors' own views. The Public Authorities Protection Act, 1893 (198–9), has now happily been repealed by the Law Reform (Limitations of Actions, etc.) Act, 1954. The proposition that mandamus cannot be employed to interfere with the actual

exercise of a discretion (254) is contradicted by *R.* v. *Vestry of St. Pancras* (265–6), among other cases. The writ of prohibition (265) is now an order. It is not clearly established or universally accepted (see *Manual of Military Law* (1951), Part I, 115–6) that obedience to unlawful orders that are not manifestly unlawful exempts a soldier from criminal liability, although it is permissible to cite the South African case of *R.* v. *Smith* in support of the principle. To the comment on the offence of public mischief should now be added a reference to *R.* v. *Newland* [1954 1 Q.B. 158.

The chapter on the Commonwealth falls somewhat below the exceptionally high general standard. If it is to be retained in the next edition, one may hope that the authors will consider whether it ought not to be expanded if it is to acquire better balance and greater accuracy. The rule in *Campbell* v. *Hall* is generally understood to apply only to representative colonial legislatures (470). The British Settlements Act, 1887, was amended in 1945 (470). There is no Attorney-General for England (480). The decision in the Canadian *Privy Council Appeals Reference* [1947] A.C. 127 did not turn "entirely on the division of powers between the Dominion and Provincial Legislatures" (480). The sentence: "The Colonial Laws Validity Act is of greatest importance in its effects on the power of amending Dominion constitutions" (481) must surely have been introduced *per incuriam*. As the judgment of the Appellate Division in *Harris* v. *Minister of the Interior* shows, the enactment of the Statute of Westminster did not endow with any new flexibility the Constitution of the Union of South Africa (483). The fact that the concept of popular sovereignty is not applied in the interpretation of federal constitutions in the Commonwealth (except in India) hardly justifies the assertion (485) that they exemplify the application of the doctrine of parliamentary sovereignty. And it is surprising to read that the present legal and political structure of the Commonwealth has been settled by the conventions that have grown up around the prerogatives to appoint and dismiss the holders of office (486).

S. A. de Smith.

Maxwell on the Interpretation of Statutes. Tenth edition by G. Granville Sharp, Q.C., B.A., LL.B., Recorder of King's Lynn, and Brian Galpin, M.A., of the Middle Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1953. cxxxix and 442 pp. and (index) 22 pp. £2 5s. net.]

Textbooks, like politicians, do not necessarily improve with age, and sooner or later the question of retirement has to be seriously considered. The determining factor is, surely, the adaptability of the subject-matter to changing conditions. Maxwell is now eighty years of age and the passage of time has endowed its *ipsissima verba* with some of the characteristics of holy writ; the traditionalists would be shocked at the very thought of a "new translation." Others, like the present reviewer, would not object to dynamic changes which might bring a nineteenth-century text more in line with twentieth-century conditions. The editors of a standard work like Maxwell must therefore try to steer a middle course to avoid the attacks of the modernists on the one hand, and the traditionalists on the other. Within these limitations the present editors have done a competent job. Here and there a few lines have been added to the text, and a very cautious introduction of references to periodical literature has been made (see, for example, at pp. 27 and 44). In the main, however, the editors have limited themselves to the task of "spring cleaning and internal decoration" which, while not adding to the quality of the structure, does enhance its appearance.

The first improvement in format which the reader will appreciate, is the division, by a printed line, of the text from the footnotes. The text itself has

been vastly improved by the liberal use of paragraphs. This latter device enables the reader to skip lightly from one so-called canon of construction to another without wading through the long catalogues of examples which tend to make Maxwell hardly more readable than a telephone directory. The present editors have made a modest start in pruning some of the historical junk which has survived too long in the previous editions, but there is still scope for further action in this regard.

A very welcome improvement is in the case citations. By and large references to the *Law Journal* and other minor series of reports have been replaced wherever possible by those of the Incorporated Council. A further step in the right direction would be to substitute (or add) references to the *English Reports*, which are usually more accessible to practitioners and students than the private or named reports.

It seems ironical that Maxwell, which is as well known in the Dominions as in England, should contain so few Commonwealth decisions, especially in view of the motley collection of ancient U.S.A. citations which appear. The editors might give serious consideration to the removal of such antiquated American decisions as are to be found, for example, at pp. 188 (dated 1851), 190 (1812), 244 (1866), 292 (1865) and 352 (1840).

It is interesting to notice that Mr. Justice Wynn-Parry, in a new foreword to this edition, acknowledges the part played by the judiciary in "making" law.

The appendix now includes the Interpretation Measure, 1925, and the Statutory Instruments Act, 1946.

Eric C. E. Todd.

Stroud's Judicial Dictionary. Third edition. By John Burke and Peter Allsop, m.a., both of Lincoln's Inn, Barristers-at-Law. [London: Sweet & Maxwell, Ltd. 1953. Vol. 4 (S–Z). xvii and 724 pp. £3 15s. net.]

Volume 4 completes the third edition of Stroud.

This volume maintains the generally excellent quality of the first three volumes (reviewed in this journal—Vol. 17 at pp. 186–7) though some errors and omissions are noticeable. For example, *Re Young* [1951] Ch. 344 should appear under Secret Trusts at p. 2690 and *Re Green* [1951] Ch. 148 deserves notice as a most recent exposition of Mutual Wills, at p. 3310.

The reference at p. 3279 to section 134 of the Local Government Act, 1929, for a statutory definition of "weighted population" is not particularly useful since the schedule to which that section refers was repealed by the Local Government Act, 1948. Indeed, why not merely cite the 1948 statute which contains a definition of these loaded citizens in section 3(2)?

In para. (3) of *Ultra-Vires* at p. 3116, Stroud cites an American case, to be found in the 2nd edition of Brice, to illustrate the proposition that *ultra-vires* and illegality are not synonymous terms. English lawyers may prefer to cite the classic statement of Lord Cairns in the celebrated *Ashbury Railway Carriage Co.* v. *Riche*, L.R. 7 H.L. 653 at p. 672.

Joyce v. *Kettle* [1948] Q.S.R. 139, cited at p. 3233 as a Commonwealth precedent on *volenti non fit injuria*, was overruled by the High Court of Australia in *Insurance Commissioner* v. *Joyce* (1948) 77 C.L.R. 39.

A matter for general criticism is the inclusion in this edition of a large number of archaic terms. Stroud is essentially a practical work. Of what value is the inclusion in a new edition of such terms as Selion, Sich, Suling, Thenecium, Verderor, and Wista, to mention only a handful from volume 4? It might have been considered more appropriate to relegate these linguistic rarities to an appendix on the basis that legal historians and antiquarians could then consult the earlier editions from which they were taken.

Finally, it must not be overlooked that Stroud has its occasional gems

of humour; for example, Cowel's definition of "Tumbrell" as ". . . an engine of punishment which ought to be in every liberty that hath view of frankpledge for the correction of SCOLDS and unquiet women." Indeed, the volumes occasionally wax poetical, as in the definition of Wilfully at p 3305, where its meaning in the Metropolitan Buildings Act, 1844, is exemplified by a quotation from Milton. Perhaps the learned authors should also tell their readers that these lines are taken from "Paradise Lost," Book xii, at approximately fifty lines from the end of the book.

Eric C. E. Todd.

Yearbook on Human Rights for 1951. Compiled by the Human Rights Division of the United Nations Secretariat. [New York: United Nations. London: H.M.S.O. 1954. xx and 652 pp. 50s.]

One's first reaction to the receipt of the sixth volume of the *Yearbook on Human Rights* is dismay at the time it has taken to prepare. The volume is the *Yearbook* for 1951 and the sales slip issued by the United Nations announces publication date as being April, 1954—why is the flyleaf dated 1953? When one recalls, however, that the volume is compiled from material primarily supplied by States, and that there must be much heartburning before legal officials decide what may be properly reported to the United Nations as contributing to the encouragement and promotion of human rights, the reasons for the delay become more apparent. To overcome the delay would necessitate a complete recasting of the basis on which the series rests. It has been a constant criticism by this reviewer that the volume is not an impartial report by the United Nations, but rather a compilation of the official apologias of governments. So long as the United Nations relies on States for providing the bulk of the material and refrains from taking the initiative lengthy delays are inevitable.

This *Yearbook* is arranged in the same way as that for 1950 and gives details of the position in seventy-seven countries, of which twenty-one are not members of the United Nations. It always surprises this reviewer to find the Union of South Africa and the Soviet Union duly reporting developments in the field of human rights to the United Nations, and the Human Rights Division including their reports in the *Yearbook*. This volume even includes the Argentine law expropriating *La Prensa*. Unless one accepts at face value the reference in the Argentine statute to the "general interest and social betterment of the Argentine people," it is difficult to see how this piece of legislation qualifies for inclusion in a *Yearbook on Human Rights*.

The entry on the United Kingdom is five pages in length and comprises an article by W. Raeburn, Q.C., on "Safeguards for the Defence in English Criminal Proceedings." This article is an interesting elementary introduction for the foreign visitor interested in English criminal proceedings, but there appears to be no reason for its inclusion in the 1951 volume of the *Yearbook*, unless it is because there is nothing else at all from the United Kingdom. From the United States, however, there is an official Government digest of treaties, Federal and state legislation, orders, judicial decisions, and other regulatory acts concerned with human rights in the United States in 1951, extending over eighteen pages.

This volume of the *Yearbook*, particularly in the sections on trust territories, specialised agencies and the United Nations, sustains the high standard set by previous volumes and makes reference to it indispensable for anybody working in the field of human rights. For those whose approach to human rights is more realistic than idealistic, it is useful to learn in the first part of the volume what States consider their own contribution to human rights to have been, and to realise that in the propaganda world in which we live so many States find it

necessary to pay lip service to the ideals of the United Nations where human rights are concerned.

L. C. Green.

Butterworth's South African Law Review, 1954. [Durban : Butterworth & Co. (Africa), Ltd. v and 197 pp. 35s. net.]

The first issue of this new annual, edited by Professors T. W. Price and B. Beinart of Cape Town, is an important event in the history of legal studies in the Union of South Africa. It provides a means for publishing longer academic articles than the present quarterly reviews can normally accept, and it is the policy of the editors to encourage fundamental research, especially in the field of comparative law.

Of the seven contributions to this issue, four are mainly concerned with problems of Roman-Dutch law. The three others are likely to be of interest to many English lawyers. Professor Price examines in detail the law of "Defence, Necessity and Acts of Authority." Mr. L. M. Thompson, in a valuable historical study of "Constitutionalism in the South African Republics," shows that apologists for the activities of the present Government in the constitutional crisis, while citing with approval the dubious practices adopted in the former South African Republic, ignore the tradition of constitutionalism followed in the Orange Free State. Professor Beinart, in a long and penetrating study entitled "Parliament and the Courts," analyses the concept of parliamentary sovereignty in relation to the courts in both the Union and in the United Kingdom, and gives special attention to the difficult problem whether a court may admit evidence to impugn the validity of an Act of Parliament which had been duly enrolled and is good on its face but has been passed in disregard of basic procedural requirements.

The future of this welcome new venture will be followed with interest.

S. A. de S.

Dayes' Handy Book of Solicitors' Costs. Ninth Edition by T. O. Carr. [London : Sweet & Maxwell, Ltd. xiv and 341 pp. £2 2s.]

Since the value of a book on costs can only finally be assessed in the light of the day-to-day use to which it can be put it may be fairly deduced from the appearance of a ninth edition that the usefulness of Dayes' to the profession has long since been established. Perusing this latest edition it is easy to see why this should be so, particularly from the standpoint of those practitioners who from necessity or from choice do not have at their disposal the services of a costs clerk. To them especially does the concise guide commend itself as they seek to take the problem of costs in their professional stride, to account unerringly for all that is chargeable and to charge precisely for all that is accountable. Dayes' clearly has the problem in mind and approaches its material along the dual lines of what may be called progress chart and index, correlating the two by references. So, steps in a High Court or county court action are specified, followed by a detailed alphabetical index showing the appropriate charges and disbursements involved. Bankruptcy and non-contentious Probate proceedings are dealt with in the same way. There is a chapter on Conveyancing and General Business, and there are most voluminous tables of scale charges for sales, purchases and mortgages including estate agents' and valuers' charges which in fact take up almost a third of the entire book.

J. A. H.

Le Droit Privé des Peuples. Caractères, Destinées, Dominantes. By R. Dekkers. [Brussels: Librarie encyclopédique. 1953. 505 pp.]

Ever since the *Esprit des loix* historians, sociologists and ethnologists have been accumulating a wealth of information on legal systems in every land under the sun, and in every period of human history. More recent arrivals, like the students of comparative legal history, have added even more to these embarrassing riches. The ultimate purpose of all this, the full understanding of legal phenomena, is still far ahead, but the author, who is Professor in the Universities of Brussels and Ghent, and one of the most outstanding Belgian lawyers of the moment, has not, however, judged it too early for the double purpose of his latest book. He does not follow the easy generalisations of less modest nineteenth-century scholars. The 206 pages of its first part (*Caractères*), which remind us of J. H. Wigmore's "Panorama," bring together in a series of sketches, which are both lucid and succinct, the essential characteristics of seventy-nine legal systems. These range in time from Sumer to the Soviet Union, and in space from Iceland to Annam. Each system receives a few pages on its history, sources and characteristics. The arrangement is extremely practical. If, for example, we look up "status of women" in the index we find references to the Anglo-Saxon, Bohemian, Welsh, Hebrew, Lithuanian, Malayan, Mongolian, Montenegrin, Moslem, Roman, Roumanian, Sumerian, Turkish and Visigothic legal systems. The second part (*Destinées*) gives a brief historical outline of the destinies of some of the main legal systems in world history. The third part of the book (*Dominantes*) is more speculative in nature, but in a very unpretentious manner. The author refrains from any *Gesammttheorie*. Instead he selects, in line with a favourite way of thought of our age (*e.g.*, M. Weber), a few types of development of institutions or legal systems; for example, "from irrational to rational," "from private to public law." The author, however, is no evolutionist and observes keenly the reversion of trends, as in the chapter "from collectivism to individualism," in which he notes the reverse trend of our time. Probably more open to criticism, though certainly very stimulating, are the author's reflections on such philosophical matters as the nature and the origin of law, the determining factors in its history and the primacy of social facts over learned speculation about them. His remarks, often bold and well coined, never sacrifice accuracy to brilliance. Based on a very varied knowledge, this "*phénoménologie juridique*" is a stimulating epilogue to the world-wide panorama which the author has unfolded before our eyes, and concludes this extremely handsome book which the lawyer, the historian and the sociologist will be glad to possess, in spite of the occasional flaws which any specialist is bound to discover in this very comprehensive work.

R. van Caenegem.

1953 Annual Survey of American Law. [Published by the New York University School of Law. Distributed by Oceana Publications Inc., New York 11. 1953. x and 1030 pp. No price stated.]

The Year Book of World Affairs 1954. [London: Stevens & Sons, Ltd. 1954. xii and 378 pp. £2 2s. net.]

Current Legal Problems 1954. [London: Stevens & Sons, Ltd. vii and 236 pp. £1 12s. 6d. net.]

These three volumes have nothing in common except that they are annual publications. However, in its own way each of them provides a useful forum for discussion.

The twelfth volume of the *Annual Survey of American Law* follows the pattern established by its predecessors and known to a small band of English lawyers from the unfortunately defunct *Annual Survey of English Law*. There are forty-four contributions which would seem to summarise all the more important developments in the vast area of American law during the year 1953. This is not a book that can be read from cover to cover. But the specialist will find it most interesting to study the articles dealing with his particular field. The articles by Professor Ralph F. Bischoff on *Constitutional Law and Civil Rights*, and by Professor Edmond Cahn on *Jurisprudence* are, however, bound to attract a wider circle of readers.

The contributions to the *Year Book of World Affairs* concentrate attention on the United Nations, since it is possible that in the year 1955 the General Assembly may call a conference on the review of the Charter. This is, of course, a publication which is primarily devoted to international affairs rather than international law. In fact, it contains only two articles written by lawyers, Mr. L. C. Green and Dr. Cheng. The former writes on "The Security Council in Retreat," the latter, under the title "International Law in the United Nations," develops his thesis that "by its neglect, if not negation, of international law, the United Nations seriously aggravates the crisis of the law of nations, which has been gathering for many years" (p. 172), and that international law cannot be restored to its proper place in the United Nations "without a sufficient degree of social integration" (p. 195).

Current Legal Problems, 1954, are of a different calibre. The volume includes twelve lectures, each of which is of considerable legal interest. Two of them, by Professor Keeton and Mr. Holland respectively, deal with constitutional problems in British Guiana and Kenya. Two are devoted to international law, Mr. L. C. Green writing on the status of international civil servants, and Dr. Hambro on the reasons behind the decisions of the International Court of Justice. Profiting from his stay at Tulane University Professor Jolowicz discusses the civil law in Louisiana. Private international lawyers will derive much benefit from Mr. Prevezer's paper on divorce in the English conflict of laws. Criminal law is enriched by a stimulating paper by Professor Glanville Williams on the defence of insanity in the light of the Report of the Royal Commission. Dr. Powell writes on the independent validity of arbitration clauses, Mr. Payne on the tort of interference, and Mr. Latham on trustee investments in American practice. Important problems of the practical administration of justice are discussed by Professor R. C. FitzGerald and Mr. Lloyd. The latter reviews the "very largely negative" conclusions of the Evershed Committee under the heading "The Cost of Litigation." He does not express his opinion on "the topic so curiously omitted from the Committee's terms of reference, namely, the fusion of the legal profession," but warns that fusion may be brought about by those very persons "who, while desiring to retain the benefits of the present system, by introducing tinkering 'reforms' so undermine the position of the Bar as to render its continued existence economically untenable." Professor FitzGerald's paper is entitled "The Role of the Solicitor in Modern Society." It is an important subject which well justifies treatment in an Inaugural Lecture by the holder of a Chair in the University of London, who is also a solicitor. While it is satisfactory that Professor FitzGerald clearly supports the idea of fusion between the two branches of the profession, he has, unhappily, failed to appreciate or, at any rate, to explain the practical implications of that idea. Nor does the remainder of his lecture disclose an effort to delve deeply into the grave problems which surround the solicitor's education, status and function. In view of the many platitudes which in recent years have been uttered on this question, and in view of the pressing need for achieving fusion and making it a success, further scholarly investigation is urgently required.

F. A. MANN.

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Douglas Payne.